SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
NOV 23
MICHAEL RODAK, JR.

Appendix

In The
SUPREME COURT OF THE UNITED STATES

January Term 1974

NO. 72-1382

F. D. RICH CO., INC.; TRANSAMERICA INSURANCE COMPANY,
Petitioner,
v.
UNITED STATES of AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC.
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 13, 1973
CERTIORARI GRANTED OCTOBER 9, 1973

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NOTE

Opinion of the U.S. Court of Appeals for the Ninth Circuit appears as EXHIBIT "A" in the Petition for Writ of Certiorari previously filed with this Court on April 13, 1973.

Judgment of the U.S. District Court For the Eastern District of California appears as "EXHIBIT "B" in the Petition for Writ of Certiorari previously filed with this Court on April 13, 1973.

EXHIBIT "1"

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ATTORNEYS FOR PLAINTIFF

In the
UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC., a corporation, Plaintiff, —vs.— CERPAC, INC., a corporation; F. D. RICH CO., INC., a corporation; and TRANSAMERICA INSURANCE COMPANY, a corporation, Defendants.	No. CIV. S-247 JUDGMENT

THIS MATTER having come on for trial before the undersigned Judge of the above-entitled Court on May 5, 1970 and May 6, 1970, judgment having been entered October 29, 1970, and appeal and cross-appeal having

been taken, the appellate decision and judgment made and filed January 22, 1973, the appellate mandate having issued February 13, 1973, and plaintiff's motion for entry of order on mandate having been heard April 16, 1973, all remaining parties having appeared and being represented by counsel, the plaintiff, INDUSTRIAL LUMBER COMPANY, INC. (Industrial), appearing by and through Gordon, Thomas, Honeywell, Malanca, Peterson, O'Hern & Johnson, and E. M. Murray and Dennis S. Harlowe, and by Cooper, Sarkisian & Sands, and W. Austin Cooper; and the defendants F. D. RICH CO., INC. (Rich) and TRANSAMERICA INSURANCE COMPANY (Transamerica), appearing and being represented by Downey, Brand, Seymour & Rohwer and Ronald N. Paul; and the Court having considered the appellate decision and mandate, and the motions and affidavits in support and in opposition to plaintiff's motion for entry of order on mandate, and the Court having fully examined the record and files herein and being fully advised in the premises; it is hereby

ORDERED, ADJUDGED and DECREED that the plaintiff, INDUSTRIAL LUMBER COMPANY, INC., a corporation, have and recover judgment against the defendant F. D. RICH CO., INC. in the amount on the date hereof of $66,999.59, together with interest thereon at the rate of 7% per annum from the date (April 16, 1973) of entry of this judgment until paid. And it is further

ORDERED, ADJUDGER and DECREED that the plaintiff, INDUSTRIAL LUMBER COMPANY, INC., a corporation, have and recover judgment against

the defendant TRANSAMERICA INSURANCE COMPANY in the amount on the date hereof of $56,683.83, together with interest thereon at the rate of 7% per annum from the date (April 16, 1973) of entry of this judgment until paid. And it is further.

ORDERED, ADJUDGED and DECREED that the liability of defendant F. D. RICH CO., INC. and TRANSAMERICA INSURANCE COMPANY shall, up to the principal amount of $56,683.83, together with interest thereon at the rate of 7% per annum from and after April 16, 1973, be joint and several. And it is further

ORDERED, ADJUDGED and DECREED that defendants' Motion For Stay of Execution pending application for Certiorari is denied.

DATED this 16th day of April, 1973.

Honorable Philip C. Wilkins
United States District Judge

Presented by:

Approved as to form:

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST:

WILLIAM C. ROBB
Clerk, U.S. District Court
Eastern District of California

By T. L. Adams
Deputy Clerk

Dated April 16, 1973

APR 13 1973
MICHAEL RODAK, JR., CLERK

In the

Supreme Court

of the

United States

Term, 1973

No. 72-1382

F. D. RICH CO., INC.; TRANSAMERICA INSURANCE COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the

Supreme Court

of the

United States

..... Term, 1973

No. .....

F. D. RICH CO., INC.; TRANSAMERICA INSURANCE COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 22, 1973.

OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of California is unreported but is attached as Exhibit B hereto. The judgment of the Ninth Circuit Court of Appeals is unreported but is attached as Exhibit A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on January 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent INDUSTRIAL LUMBER COMPANY, INC., supplied plywood to an entity known as CERPAC, INC. which in turn supplied it to Petitioner, F. D. RICH CO., INC. for use in a Federal housing project at Beale Air Force Base, California, except for two shipments of plywood which went to another Federal project in South Carolina. INDUSTRIAL LUMBER contended that CERPAC was a subcontractor and, accordingly, filed claim under the Miller Act asking for the value of materials furnished to both the California and South Carolina jobs and for attorneys' fees and interest. The District Court allowed recovery for all of the shipments after ruling that CERPAC was a subcontractor and not a materialman, but denied attorneys' fees. The Circuit Court affirmed except that it ruled that attorneys' fees were recoverable on this Miller Act case in California.

Against this background, the questions presented are:

1. Did the Circuit Court below err in holding that Respondent INDUSTRIAL could recover attorneys' fees in this Miller Act claim filed in California?

2. Did the Circuit Court below err in holding that Respondent INDUSTRIAL LUMBER could sue and recover in California for items shipped to and used in South Carolina despite the language of 40 U.S.C.

270(b) of the Miller Act which provides that the suit shall be brought in the district in which the contract was to be performed and executed "but not elsewhere?"

3. Did the Circuit Court below err in looking to other contracts other than the one between Respondent INDUSTRIAL and CERPAC in order to reach a conclusion that CERPAC was a subcontractor and not a materialman? (The Circuit Court conceded that Respondent INDUSTRIAL could not recover if CERPAC were merely a materialman and the Circuit Court below further conceded, at least by implication, that the contract between INDUSTRIAL and CERPAC by itself merely made INDUSTRIAL a supplier to a supplier and thus its claim would be barred under the Miller Act.)

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The legislation commonly known as the Miller Act is found in 40 U.S.C. Annotated §§270(a) and 270(b) and is set forth in Exhibit "C".

STATEMENT

The basic facts are not in dispute and are accurately reported in the Circuit Court decision below. Respondent INDUSTRIAL LUMBER was providing ordinary 4′ X 8′ plywood to CERPAC which in turn was supplying the plywood without alteration of any kind to Petitioner RICH at Beale Air Force Base, California. The standard plywood in fact was furnished by suppliers *to INDUSTRIAL* directly to Beale Air Force Base. The shipments began approximately March 10,

1966. At a time thereafter, RICH told CERPAC that it needed some plywood on a government project in Charleston, South Carolina. CERPAC arranged to have two truckloads of plywood which were originally designated to go to Beale Air Force Base to be, and they were, delivered to South Carolina and used on the Charleston, South Carolina, project. CERPAC fell behind in its payments to INDUSTRIAL and an agreement was accordingly made between RICH, CERPAC and INDUSTRIAL that the last two truck loads to be delivered to Beale (not the two shipments that went to South Carolina) were to be paid for directly by Petitioner RICH, and CERPAC would get a commission from INDUSTRIAL. The plywood was so delivered. The Court understood that unless these last two shipments which were a matter of direct contract between RICH and INDUSTRIAL could be somehow "tacked" to previous shipments arranged by CERPAC for which no payment had been made, that INDUSTRIAL'S Miller Act claim was untimely in that INDUSTRIAL would not have given written notice to RICH within the 90 days from the date on which it last supplied materials, as required by 40 U.S.C. Annotated 270(b) (a).

Although the materials furnished by INDUSTRIAL were merely standard pieces of plywood, CERPAC had in fact other contracts with other parties not involving INDUSTRIAL which, when analyzed by the Court, were determined to place CERPAC in the status of a subcontractor and thus the 90 day notice problem was circumvented in the Court's opinion.

The Circuit Court further decided with reference to the two shipments which were delivered to South Carolina that, although Petitioner RICH had timely objection to this portion of the claim being presented in a California District Court, the objection was merely one to the venue and not a jurisdictional matter. The objection was disregarded.

Finally, but of equal importance, the Circuit Court reversed the District Court and ruled as a matter of first impression that attorney's fees were recoverable in this Miller Act claim filed in California. The Court decided that the phrase "the sum or sums justly due" (40 U.S.C. Annotated 270(b)(a)) should be interpreted to include attorneys' fees even though attorneys' fees are no where mentioned in the Miller Act. The Circuit Court remanded the matter to the District Court for purpose of determining whether it wished to reconsider the amount of attorneys' fees to be awarded and whether it wished to compute attorneys' fees on appeal. This matter has not been decided by the District Court.

REASONS FOR GRANTING THE WRIT

1. Attorneys' Fees. The Circuit Court's decision and its interpretation of the Miller Act statute seem to be in contradiction to the holding of the United States Supreme Court in *Fleischmann* v. *Maier Brewing Co.*, 386 U.S. 714, 18 L ed. 2d 475, 87 S Ct. 1404. In *Fleischmann*, this honorable Court announced

> "The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." 18 L ed 2d p. 478

Exceptions to the American rule were noted by this honorable Court but the matter of awarding attorneys' fees in a Miller Act decision was not one of them.

Of interest also is the fact that the Circuit Court's decision, which purportedly looks to California law, is in conflict with a decision of a California Intermediate Appellate Court which ruled that there could be no recovery of attorneys' fees on a suit on a Capehart Act bond based upon the Miller Act statute (*B. C. Richter Contracting Co.* v. *Continental Casualty Co.*, 230 Cal. App. 2d 491 (1964)). It is, of course, also true that in actions at law in California attorneys' fees are not recoverable in the absence of a contractual agreement or a special statute. (*Reid* v. *Valley Restaurants, Inc.*, 48 Cal. 2d 606, 610).

2. *Venue.* The Circuit Court's decision to allow suit upon and recovery for the two shipments for plywood received and used in a project in Charleston, South Carolina, would seem to be in conflict with the prevailing rule in other circuits. For example, the District Court in *U.S.* v. *Rondout Marine, Inc.*, 312 F Supp. 846 (1970) explained the reasonings supporting its conclusion that the so-called venue requirement of the Miller Act is in fact mandatory and *jurisdictional*, stating that

> "Since such suits sometimes involve disputes as to performance, the venue requirement facilitates the subpoenaing of essential witnesses who participated in the work at the contract site." (See also *U.S. for Use and Benefit of Capolino Sons* v. *Electronic & Missile Facilities, Inc.*, 364 F 2d 705, 707 (2d Cir. 1966)).

While it is true that the Circuit Court below refused to give a judgment against TRANSAMERICA INSURANCE COMPANY, a Petitioner herein, relative to the Charleston shipments, (because it was not the surety on the Charleston job,) it nevertheless awarded the judgment against Petitioner RICH. It is clear that witnesses to any deficiency claim are outside the subpoena power of the District Court for the Eastern District of California, thus illustrating the difficulty with any erosion of the mandatory venue provision.

3. *The Determination of CERPAS as a Subcontractor.* Here we are concerned with standard 4' X 8' sheets of construction plywood which were not altered, treated or otherwise disturbed but were simply shipped by a supplier of Respondent INDUSTRIAL to RICH at Beale Air Force Base, California pursuant to a contract between that supplier and INDUSTRIAL; a further contract between INDUSTRIAL and CERPAC; and a further contract between CERPAC and RICH. It is, of course, acknowledged that CERPAC had agreed in its contract with RICH to supply all of the plywood used on the job. However, this requirement is no different than that in *U. S. ex rel Bryant* v. *Lembke Construction Co.* (10th Cir. 1966) 370 F 2d 293, 296, wherein one supplied all of the concrete required for a job and was held to be merely a materialman. The Circuit Court below acknowledged the *Lembke* case but then went on to examine another contract between CERPAC and RICH in which INDUSTRIAL was in no way involved or concerned and decided that since CERPAC was probably a subcontractor under the other contract, it would be also a

subcontractor in the case of INDUSTRIAL. Petitioner submits that this is a novel and new test regarding the status of the intermediary and one that is not contemplated by the Miller Act.

4. *The Overview.* Petitioners submit that the foregoing three problems in themselves are of great and recurring significance in the administration of the Miller Act throughout the various circuits. This Court should examine the questions for purposes of establishing rules of universal application.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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EXHIBIT "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
for the use of INDUSTRIAL
LUMBER COMPANY, INC.,
Plaintiff-Appellee,

v.

F. D. RICH CO., INC., and
TRANSAMERICA INSURANCE CO.,
a corporation,
Defendants-Appellants.

No. 71-1519

UNITED STATES OF AMERICA
for the use of INDUSTRIAL
LUMBER COMPANY, INC.,
Plaintiff-Appellant,

v.

CERPAC, INC.,; F. D. RICH CO., INC.,
and TRANSAMERICA INSURANCE CO.,
a corporation,
Defendants-Appellees.

Filed Jan. 22, 1973

Dennis R. Mathews,
Clerk, U.S. Court of Appeals

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Before: BROWNING, CARTER and WRIGHT, Circuit Judges.

JAMES M. CARTER, Circuit Judge:

This is an appeal by F. D. Rich Co., Inc. (hereafter Rich) from a judgment in favor of Industrial Lumber, Inc. (hereafter Industrial), a building materials supplier, against Rich, a prime contractor on a government construction project, and Transamerica Insurance Co., his surety under the Miller Act, 40 U.S.C. §§270a - d (1970). There is also a cross-appeal by Industrial, for interest on unpaid invoices, and attorneys' fees.

The issues presented on the appeal are:

(1) Was Cerpac, the intermediary who furnished plywood (and, under another agreement, certain millwork), a "subcontractor" for Miller Act purposes?

(2) Does the agreement of Rich, the prime contractor, to pay Industrial, the plywood supplier, directly, rather than through the intermediary Cerpac, for the last two shipments under the contract preclude consideration of those two shipments as the "last material for which claim is made" to establish timeliness of the Miller Act notice?

(3) Is venue proper in California for shipments supplied pursuant to a contract to be performed there, but diverted to South Carolina with the knowledge of all parties?

The issues presented on the cross-appeal by Industrial are:

(4) Should pre-judgment interest have been awarded to Industrial at 8 percent, as stated in the invoices,

rather than at 7 percent for unliquidated claims pursuant to California statute?

(5) Should attorneys' fees have been awarded to Industrial under federal law, for this California claim?

On the appeal, we affirm the District Court's judgment for the plywood supplier, Industrial, against Rich and against Transamerica Insurance Co., except as to two shipments diverted to South Carolina. On the cross-appeal, we reverse and direct that Industrial be awarded interest at 8 percent, plus reasonable attorneys' fees, as detailed below. It is first necessary to summarize the salient facts.

FACTS

From 1961 through 1968, appellant Rich built numerous Federal housing projects, and during 1963-1966, Cerpact furnished most, if not all, of the millwork and plywood for these projects. Cerpac's president, Cervi, had close relationships with Rich, its officers and personnel. Principals of Rich held a substantial voting interest in Cerpac stock, were completely familiar with its operations and financial condition, and supplied a substantial share of its working capital.

On October 18, 1965, Rich contracted with the United States to build family housing at Beale Air Force Base, California. Rich's surety, appellant Transamerica, posted the required payment bond under the Miller Act, 40 U.S.C. § 270a. Rich awarded Cerpact two contracts, one for all custom millwork, and one for all exterior plywood, each incorporating by reference terms of the prime contract. These contracts were similar to those which previously had been completed between the parties on other jobs over the years.

On February 22, 1966, Cervi placed a single order with appellee Industrial for all exterior plywood required by Rich at Beale, designating the order as "Beale 647." Industrial then ordered plywood from its own suppliers, assigned order numbers to specific shipments to be used as necessary, and designated its mill orders as contract "Beale 647." The shipments to Rich at Beale began approximately March 10, 1966, and as each truckload arrived it was receipted for by a Rich representative.

Shortly thereafter, Rich told Cervi that more plywood was needed for another government project at Charleston, South Carolina, in which the two had similar relationships. Industrial was so advised, and obtained approval from the mill. For the convenience of Rich and Cerpac, then, two truckloads of plywood, still designated as "Beale 647," were delivered to Inness, South Carolina, and used on the Charleston project.

During April and May, 1966, Cerpac fell behind in its payments to Industrial for the plywood shipments, and Cervi was told that Industrial would not deliver the final two truckloads until assurances of payment were given. The parties subsequently agreed that Rich would pay Industrial directly for the last two shipments, with Cerpac to receive its customary profit as a commission from Industrial. The last two shipments arrived at Beale on May 16 and June 23, 1966. The invoices for these shipments, as all Industrial invoices herein, were payable in full in 30 days, with annual interest of 8 percent after the due date.

On July 13, 1966, having received no payment on nine separate invoices, Industrial formally gave Rich and

Transamerica, the surety, a written notice of claim under the Miller Act, and thereafter timely brought this action. Cerpac filed in bankruptcy in October 1966, and is not a party to this appeal. The nine specific invoices were part of the extensive evidence considered by the trial court, which made detailed findings of fact and conclusions of law. Except as otherwise noted herein, our review shows that those findings and conclusions were correct.

The District Court gave judgment for Industrial against Transamerica on the bond, and against Rich and Cerpac as primary obligors, all jointly and severally for the amount of all nine unpaid invoices, $31,402.97, plus 7 percent interest from March 13, 1967, to the date of judgment ($7,974.70), plus costs. Rich appeals the award, and Industrial cross-appeals on questions of interest and attorneys' fees.

WAS CERPAC A SUBCONTRACTOR?

The Miller Act provides that those who furnish material for government work for which a bond has been given under 40 U.S.C. § 270a, may sue on that bond

> ". . . *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made . . . ." *Id.*, § 270b(a).

It is undisputed that Rich had a direct agreement with Industrial only as to payment for the two final shipments of plywood. Unless that agreement extends to the previous shipments as well, and we are not convinced that it did, Industrial cannot recover for them unless it can show that Cerpac was a "subcontractor" under the Act, and the strict requirements of the Act are otherwise met. *See Fidelity & Dep. Co. of Md.* v. *Harris* (9 Cir. 1966) 360 F.2d 402, 410. One who furnishes materials to a supplier (as opposed to a subcontractor) has no rights under the Miller Act. *Clifford F. MacEvoy Co.* v. *United States* ex rel. *Calvin Tomkins Co.*, 322 U.S. 102, 104 (1944).

In *MacEvoy*, the Supreme Court stated the following definition:

> "[A] subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen." 322 U.S. at 109.

The Court held that Congress cannot be presumed to have intended liability on a payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. It is easy for him to secure payment by a bond when there are relatively few subcontractors who are well known to him, and who represent him in a sense. But it is too great a risk to extend the primary's liability to the remote and undeterminable liabilities incurred by ordinary materialmen. *Id.* at 110.

In *Basich Bros. Const. Co.* v. *United States* ex rel. *Turner* (9 Cir. 1946) 159 F.2d 182, we held that a

subcontractor who performed all the labor and supplied all materials for completion of certain specified work, in accordance with the terms of the prime contract, was a subcontractor within the above definition. The distinction between subcontractors and materialmen turns on the substaniality and importance of the relation between the middle party and the prime contractor. *Aetna Cas. & Sur. Co.* v. *United States* ex rel. *Gibson Steel Co.* (5 Cir. 1967) 382 F.2d 615, 617. One is not a subcontractor if "[t]here was no material delegation of the job the prime contractor was obligated to perform under the prime contract." *United States* ex rel. *Bryant* v. *Lembke Const. Co.* (10 Cir. 1966) 370 F.2d 293, 296.

Bearing these principles in mind, we conclude that Cerpac was a subcontractor to Rich, and therefore that under the Miller Act, Industrial could properly claim for the payments herein involved. In *Lembke, supra,* one who supplied all the concrete required for a job, under a "Standard Form of Material Contract," was held to be a materialman. *Id.* at 295-97. Here, we have no such form of contract. In *Lembke,* the concrete was in no way "customized," and there was no delegation of the prime contractor's obligations under the prime contract. *Id.* In our case, although the plywood Cerpac was to supply to Rich was simply ordered from Industrial and delivered without any further alteration or special selection, we cannot base our decision solely upon that one transaction.

A contract between the parties, other than the one claimed upon, is material to the inquiry whether one is a subcontractor. *Travelers Indem. Co.* v. *United States* ex rel. *Western Steel Co.* (9 Cir. 1966) 362 F.2d 896,

898. Here, Cerpac had also contracted to supply, detail, and install all millwork for the Beale project. Unlike *Lembke*, where the materialman merely delivered concrete, 370 F.2d at 295, in our case Cerpac selected, modified, and installed the millwork, all of which involved substantial services to the owner of the project, the United States. This was "a specific part of the labor or material requirements of the original contract" under *MacEvoy*, *supra*, and rendered Cerpac a subcontractor for Miller Act purposes.

Unlike *Lembke*, *supra*, we have here no findings below that the two contracts were separately treated by the construction industry, as well as by the parties involved. Cerpac and Rich had previously engaged in many similar projects, with Cerpac performing similar kinds of detailed work. Officers of Rich had substantial financial involvement in and control over Cerpac.

Therefore, under *MacEvoy*, *supra*, Cerpac was not one of the "ordinary . . . materialmen" supplying Rich, but was in a special, integral, almost symbiotic relationship to Rich. Cerpac's relationship was both "substantial and important," *Aetna Cas. & Sur. Co.*, *supra*, and there was a material delegation of the prime contractor's job, *Lembke*, *supra*. Rich and Cerpac had built government housing in many places over a substantial number of years. It would have been "easy for the prime contractor to secure himself against loss by requiring [Cerpac] to give security by bond, or otherwise . . . ." *MacEvoy*, *supra*, 322 U.S. at 110 (substituting the name of our party herein). The result here reached will not cause liability to be imposed for remote and undeterminable liabilities of materialmen little known to the prime contractor. *Id.*

MILLER ACT NOTICE

The Act provides that within 90 days of the last furnishing of materials, those who have furnished supplies to subcontractors and who have no contractual relationship to the prime contractor must notify the prime contractor of their materialmen's claims. 40 U.S.C. § 270b(a), quoted *supra*. It is here urged that such notice was insufficient because Rich agreed directly with Industrial to pay for the last two shipments, and those two shipments are the only ones within the required 90 days of the notice given by Industrial. We disagree.

The notice must only be "within 90 days from the date on which he [claimant] performed the last labor or furnished or supplied the last material for which claim is made." *United States* ex rel. *Austin* v. *Western Elec. Co.* (9 Cir. 1964) 337 F.2d 568, 572; 40 U.S.C. § 270b(a), *supra*.

> "[T]he test to be applied is whether the work was performed and the material supplied as a 'part of the original contract' or for the 'purpose of correcting defects . . . .'" *Western Elec. Co.*, *supra*, 337 F.2d at 572-73.

In our case, it is apparent that all shipments were made under Industrial's plywood contract known as "Beale 647," and were furnished to Rich, at Beale or elsewhere (two were diverted to South Carolina), under the designation "Beale 647." Although Rich was to pay Industrial directly for the last two shipments, and Cerpac was to receive a commission, the overall terms, despite their different form, were the same as for all other "Beale 647" shipments. The cost to Rich did

not vary. We hold that the notice was sufficient and timely.

VENUE

The Miller Act provides that "Every suit instituted under this section shall be brought in . . . the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . . ." 40 U.S.C. § 270b(b). This requirement is not jurisdictional, but is a venue provision only. See *United States* ex rel. *Capolino Sons, Inc.* v. *Electronic & Missile Facilities, Inc.* (2 Cir. 1966) 364 F.2d 705, 707, cert. dism., 385 U.S. 924. We are urged to hold that Industrial should recover, if at all, only in South Carolina and not in California, for the two shipments which were delivered to Inness, South Carolina.[1]

Appellee Transamerica bonded Rich only for the Beale project, not for the one in South Carolina. It is settled that "the surety [is] liable only for material supplied in connection with the bonded project." *United States* ex rel. *Carter-Schneider-Nelson, Inc.* v. *Campbell* (9 Cir. 1961) 293 F.2d 816, 818, cert. denied, 368 U.S. 987 (1962). Therefore, judgment against Transamerica is reversed and judgment is directed to be entered in its favor, as to the two shipments which were sent to and undisputedly used on the South Carolina job. This result is in accord with the general purpose of the Miller Act, to provide bonds in lieu of liens against the property and buildings, because such liens cannot attach to government property. *See Illinois Sur. Co.* v. *The John Davis Co.*, 244 U.S. 375, 380 (1917), discussed *infra*.

But the same rule does not apply and we do not reach the same result with respect to Industrial's claim against Rich and Cerpac. These three parties agreed in California to ship the plywood to South Carolina, for Rich's and Cerpac's convenience, and pursuant to the "Beale 647" contract. When the question has been whether materials were actually used in a job, it has been held that the claimant need not so prove, "but only that in good faith he reasonably believed that the materials were so intended." *United States* ex rel. *Westinghouse Elec. Sup. Co.* v. *Endebrock-White Co.* (4 Cir. 1960) 275 F.2d 57, 60. In our case, Industrial could not have had such a belief, because it knew beforehand that the two shipments were for use in South Carolina and not at Beale.

But in *Endebrock-White Co., supra*, the question arose in the context of proof that certain materials were furnished at a time within 90 days of the notice given. That is not our question here. We are instead concerned with the express language of the statute, which requires Miller Act claims to be brought where "the contract was to be performed and executed." 40 U.S.C. § 270b(b), *supra*. Beale Air Force Base, as the lower court found, is within the Eastern District of California. The shipments to South Carolina were made under the "Beale 647" contract, and at its terms. Industrial's recovery thereunder should not, we hold, be defeated merely because Rich and Cerpac had Industrial send the plywood outside the district for their own convenience. The Miller Act's provisions are remedial, and to be liberally construed. *MacEvoy, supra*, 322 U.S. at 107.

Moreover, considerations of judicial economy and convenience warrant the course adopted here. The contract was executed and the parties did business thereunder in California, where also was located the remainder and larger share of Industrial's claim. No affirmative prejudice has been brought to our attention. We therefore affirm Industrial's recovery against Rich (Cerpac not being a party to this appeal).

INTEREST

The District Court in its discretion awarded 7 percent interest for an *unliquidated* amount, under *Calif. Civil Code* § 3287(b), from the date of filing of the action. This was error. The amounts awarded Industrial were liquidated. Each element of damages was specified by invoice, at the contract price, and thus was at least reasonably calculable. Industrial should have been awarded 8 percent interest, under the terms of the invoices, from the date payment was due (30 days after delivery). *See id.*, § 3287 (a); *L & E Co.* v. *United States* ex rel. *Kaiser Gypsum Co.* (9 Cir. 1965) 351 F.2d 880, 883. Any legal rate of interest stipulated by contract is chargeable after breach thereof. *Calif. Civil Code* § 3289.

ATTORNEYS' FEES

The Miller Act does not speak to the question whether prevailing parties may recover attorneys' fees as additional damages or costs, nor is there legislative history on the issue. *See Transamerica Ins. Co.* v. *Red Top Metal, Inc.* (5 Cir. 1967) 384 F.2d 752, 56 & n.4.

In discussing another federal statute which gives a federal remedy but does not mention attorneys' fees,

the Lanham Act, the United States Supreme Court held that such fees were not a part of the remedy thereunder. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967). The Lanham Act, however, provided for expressly specified elements of damages in the event of trademark infringement, such as recovery of defendant's profits, any damages sustained by plaintiff, and upward or downward adjustment of the calculated damages in the discretion of the court. 15 U.S.C. § 1117. The Supreme Court held that "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Id.* at 720. Several attempts to add attorneys' fees to the remedies listed in the Lanham Act had failed of passage in Congress. *Id.* at 721. In our case, we have no such circumstances. *Cf. Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970); *Lee* v. *Southern Home Sites Corp.* (5 Cir. 1971) 444 F.2d 143, 145. The Miller Act, 40 U.S.C. §§ 270a - d, *supra*, has a broadly remedial purpose:

> "The purpose of the act was to provide security for the payment of all persons who provide labor or material on public work. This was done by giving a claim under the bond in lieu of the lien upon land and buildings customary where property is owned by private persons. Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally, in order to effectuate the purpose of Congress as declared in the act." *Illinois Sur. Co.* v. *The John Davis Co.*, 244 U.S. 376, 380 (1917) (Brandeis, J.).

The language of the statute itself says that the "payment bond" is given "for the protection of all persons

supplying labor and material in the prosecution of the work . . . ." 40 U.S.C. § 270a(a) (2). The right of action against the bond[2] is given to eligible claimants "for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him . . . ." 40 U.S.C. § 270b(a).

The Act thus confers both the right "to prosecute said action to final execution and judgment," and to recover thereby "the sum or sums justly due." *Id.* These remedies are given "in lieu of the lien upon land and buildings customary where property is owned by private persons," *Illinois Sur. Co., supra,* because such liens cannot attach to federal land and buildings. The federal remedy was intended to substitute for the unavailable state remedy of the lien. Therefore, if state law allows a supplier on private projects to recover such fees, there is no reason for a different rule to apply to federal projects, as stated in *Red Top Metal, Inc., supra,* 384 F.2d at 756:

> "The Miller Act itself reflects the Nation's interest in seeing that mechanics and materialmen engaged in work for the national government are protected at least as well as are those engaged in private work whom the state protects. It seems reasonable therefore to look to state policy to determine whether the 'protection' afforded by 'payment' [under the terms of the Act] encompasses full recoupment of all costs and damages, such as attorneys' fees."

The *Red Top Metal* court then looked to Texas law, held that attorneys' fees could not be recovered for private projects there, and so could not be had under

the Miller Act. We, however, must look to the policy of California law.

In California, the state Court of Appeals has held that although attorneys' fees are recoverable under *Calif. Govt. Code* § 4207 in state actions on the bonds of public works contractors, that statute applies only to such bonds for state and local government-authorized jobs, and "has no application to private construction projects or to projects of the United States," *B. C. Richter Contr. Co.* v. *Continental Cas. Co.*, 230 Cal. App.2d 491, 506, 41 Cal.Rptr. 98 (1964).[3]

In so holding, we think the California court read their state's law into the federal law with unnecessary severity. The court looked only for a state statute expressly authorizing attorneys' fees for federal projects, and, not surprisingly, found none. We think that the opposite conclusion should be drawn. That is, the California statute awards attorneys' fees on projects covered by mandatory contractors' bonds. The federal Miller Act covers similar projects. Justice Brandeis noted that such bonds (be they federal or state), are given to protect suppliers in lieu of the liens which apply where property is privately owned. *Illinois Sur. Co.*, *supra*, 244 U.S. at 380.

Hence the federal and state law is congruent, each providing for bonds to protect materialmen in lieu of liens against government property, state or federal. *See United States* ex rel. *Chevron Asphalt Co.* v. *Maryland Cas. Co.* (E.D. Calif. 1970) 316 F.Supp. 750, a well-reasoned opinion by Chief Judge MacBride, which we now approve in its general legal discussion. Judge MacBride disapproved *Richter*, *supra*, as to federal law, and

held that under the *policy* of California law, not its *letter*, attorneys' fees were recoverable in Miller Act cases, to be taxed as costs.

In summary, then, we hold that attorneys' fees may be recovered as costs in Miller Act cases wherein California law is the referent state law. [4] The trial court herein was sufficiently impressed with the issue of fees to make specific findings thereon, stating that "A reasonable and necessary fee, were one to be awarded, is 25% of the plaintiff's recovery of principal and interest, which sum would be added to plaintiff's judgment, if awarded."

We must uphold this finding on this appeal; we cannot hold that 25% of the award would constitute an unreasonable attorneys' fee. However, the District Court's finding was not made in light of our present holding that fees are definitely to be awarded, nor did that court consider the possibility of an increment for attorneys' fees on appeal. We express no opinion about such calculations at this time, but we leave the District Court free on remand to renew its consideration of the problem and to reaffirm or modify its specific award of attorneys' fees as justice may require.

CONCLUSION

The judgment is affirmed in all respects as to the Rich appeal, except that it is reversed and judgment will be given for Transamerica as to the two shipments delivered to South Carolina. On Industrial's cross-appeal, the judgment is reversed and remanded for further proceedings consistent with this opinion.

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC., a corporation, *Plaintiff*, v. CERPAC, INC., a corporation, F. D. RICH CO., INC., a corporation, TRANSAMERICA INSURANCE COMPANY, a corporation, DOES I to X, *inclusive*, *Defendants.*	No. Civ. S-247

JUDGMENT

THIS MATTER having come on for trial before the undersigned Judge of the above-entitled court on May 5, 1970 and May 6, 1970 and the remaining parties appearing, and being represented by counsel, the plaintiff, INDUSTRIAL LUMBER COMPANY, INC., (INDUSTRIAL), appearing by COOPER, BRODOVSKY & SARKISIAN and W. AUSTIN COOPER, and by BLAIR, THOMAS, O'HERN & DAHEIM and DALE L. CARLISLE; and the defendants, F. D. RICH CO., INC. (RICH) and TRANSAMERICA INSURANCE COMPANY (TRANSAMERICA), appearing by DOWNEY, BRAND, SEYMOUR & ROHWER and RONALD N. PAUL; and the defendant, CERPAC, INC. (CERPAC), a corporation, not appearing or being otherwise represented, and being in default herein; and the Court having heard all evidence

presented, and having rendered on May 6, 1970, its oral decision and opinion, constituting the Court's oral findings of fact and conclusions of law, and the Court having further entered its findings of fact and conclusions of law herein, and having fully examined the files herein and being fully advised in the premises; it is hereby

ORDERED, ADJUDGED AND DECREED that the use plaintiff, INDUSTRIAL LUMBER COMPANY, INC., a corporation, have and recover judgment against the defendants, CERPAC, INC., a corporation; F. D. RICH CO., INC., a corporation; and TRANSAMERICA INSURANCE COMPANY, a corporation, and each of them, jointly and severally, in the sum of THIRTY ONE THOUSAND FOUR HUNDRED TWO and NINETY-SEVEN ONE HUNDREDTHS DOLLARS, ($31,402.97), plus interest at the statutory rate of Seven percent (7%) per annum from March 13, 1967, to the date of this judgment, such interest being the sum of $7,974.70; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff shall have judgment against the defendants for costs taxes herein as by law provided; and it is further

ORDERED, ADJUDGED AND DECREED that the judgment awarded herein, plus interest and costs, shall bear interest at the statutory rate until such judgment is satisfied.

DATED this 29th day of October, 1970.

Philip C. Wilkins
Judge

EXHIBIT "C"

§ 270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given. Aug. 24, 1935, c. 642, § 1, 49 Stat. 793; Nov. 2, 1966, Pub. L. 89-719, Title I, § 105(b), 80 Stat. 1139.

§ 270b. Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Aug. 24, 1935, c. 642, § 2, 48 Stat. 794; Aug. 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279.

FOOTNOTES

[1] There is an action by Industrial pending in the District Court for South Carolina. We, of course, express no opinion about it, but consider only the action before us.

[2] Jurisdiction in the District Court of the action against the prime contractor, Rich, rested on the doctrine of pendent jurisdiction. *Brown & Root, Inc.* v. *Gifford-Hill & Co.* (5 Cir. 1963) 319 F.2d 65, 67-68. The question was not raised on this appeal.

[3] The *Richter* case involved the Capehart Act, which however is the same as the Miller Act in respect of attorneys' fees. *See United States* ex rel. *Chevron Asphalt Co.* v. *Maryland Cas. Co.* (E.D. Cal. 1970) 316 F.Supp. 750, 751 n.l.

[4] Appellee Industrial urges us to retroactively apply *Calif. Civil Code* § 3250, which permits recovery of attorneys' fees on suits on contractors' bonds but was

passed after the trial court's decision herein, and became effective January 1, 1971. *Cf. United States* ex rel. *Hendry Corp.* v. *Smith Eng'r & Const. Co.* (N.D. Fla. 1965) 240 F.Supp. 189, rev'd on other grounds, sub nom. *United States Fidel. & Guar. Co.* v. *Hendry Corp.* (5 Cir. 1968) 391 F.2d 13, 21 (fees allowed for reasons stated by District Court). In view of the result we have otherwise reached, we express no opinion on this question.

SUPREME COURT, U. S.
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1382

F. D. RICH CO., INC.;
TRANSAMERICA INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
for the use of
INDUSTRIAL LUMBER COMPANY, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief For Respondent In Opposition

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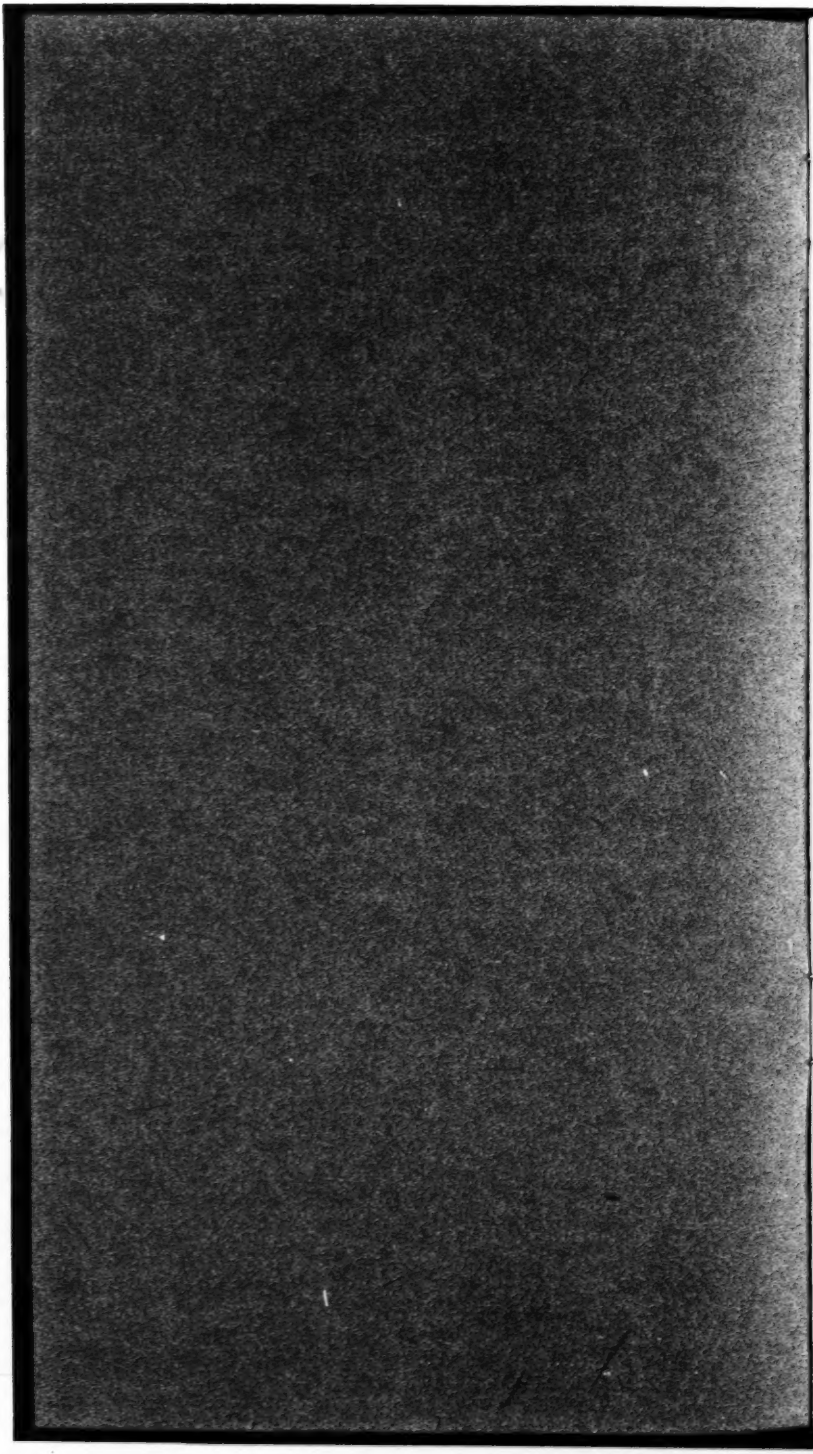

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IN THE

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OPINION BELOW

The opinion of the Court of Appeals is officially reported. *U.S. ex rel. Industrial Lumber Company, Inc. v. F. D. Rich Co., Inc., et al.*, 473 F.2d. 720 (9th Cir., 1973).

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Petitioner's "background" introducing the questions presented is an inaccurate summary. Respondent refers to the opinion of the Court of Appeals for a more accurate statement of the facts found by the District Court as established by the evidence. 473 F.2d 270 *et seq.*

Each of the questions presented have been previously considered and rejected:

1. Award of Attorneys' Fees. California law awards attorneys' fees on projects covered by mandatory state contractors' bonds. Those engaged in work for the federal government in California are protected at least as well as are those engaged in non-federal work, whom the state protects.

2. Venue. So far as Petitioner F. D. Rich Co., Inc. is concerned, this suit was brought in California where "the contract was to be performed and executed." The surety having the Miller Act bond on the California project was not held liable by the Court of Appeals for the two shipments under the contract diverted to South Carolina by Rich. Rich was not prejudiced by having a single trial in California for all money due on the one contract.

3. Subcontractor status. Petitioner's challenge to the status of Cerpac as a subcontractor ignores the facts established in the record. Much more than just the existence of two contracts supports the finding and conclusion that Cerpac was a subcontractor for all purposes within the meaning of the Miller Act and not an ordinary materialman. Cerpac had "a special, integral, almost symbiotic relationship with Rich . . . (the) relationship was both 'substantial and important.'" 473 F.2d, page 724.

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate. Respondent again refers to the factual presentation contained in the opinion of the Court of Appeals, 473 F.2d 720 (9th Cir., 1973), for a more accurate statement of the facts established by the evidence.

Some of the particulars Petitioner's statement of the case ignores are: (a) a substantial and important relationship between Rich and Cerpac existed over a period of several years and throughout the period of the dispute here involved; (b) the actual text of the contracts taken by Cerpac from Rich represented a substantial and complete segment of the work required under the prime contract between Rich and the United States at Beale Air Force Base, California and on many similar projects; (c) the contract between Cerpac and Industrial was not rescinded by an additional oral promise of Rich to see that Industrial was paid; (d) the "other contracts" referred to by Petitioner were not with "other parties" but contracts between Cerpac and Rich (e) Transamerica was the surety which bonded the job at Beale Air Force Base but the judgment in this case was not entered against Transamerica by the Court of Appeals so far as the two shipments diverted by Rich to South Carolina are concerned; (f) Rich was in no way prejudiced by having these two shipments considered at the trial in California along with all others under the same contract.

ARGUMENT

None of the reasons put forth by Petitioner can be fairly construed to merit review on Writ of Certiorari. Rule 19(b), Supreme Court Rules.

1. *Attorneys' Fees.* Petitioner claims the decision of the Court of Appeals in the instant case seems to conflict with the decision of this Court in *Fleischmann v. Maier Brewing Co.*, 386 U.S. 714, 18 L. Ed. 2d 475. This contention was considered at length and rejected in the opinion of the Court of Appeals, 473 F.2d, pages 726-728.

There is substantial authority for the award of attorneys' fees in Miller Act cases, when such fees are allowed by the referent state law. *Arnold v. U.S. ex rel. Bowman Mechanical Contractors, Inc.*, 470 F.2d 243 (10th Cir., 1972); *United States ex rel. White Masonry, Inc. v. F. D. Rich Co.*, 434 F.2d 855 (9th Cir., 1970); *Transamerica Insurance Co. v. Red Top Metal, Inc.*, 384 F.2d 752 (5th Cir., 1967); *T. F. Scholes, Inc. v. United States*, 295 F.2d 366 (10th Cir., 1961); *United States ex rel. Magnolia Petroleum Co. v. H. R. Henderson & Co.*, 126 F. Supp. 626 (D.C. Ark., 1955); *United States ex rel. Brady's Floor Covering, Inc. v. Breeden*, 110 F. Supp. 713 (D.C. Alaska, 1953).

The reliance placed by Petitioner on the California state decision in *B. C. Richter Contracting Co. v. Continental Casualty Co.*, 230 Cal. App. 2d 491 (1964), is similarly misplaced, and the contention was refuted in the opinion of the Court of Appeals, 473 F.2d 727. As stated in *U.S. ex rel. Chevron Asphalt Co. v. Maryland Cas. Co.*, 316 F. Supp. 750 (E.D. Cal., 1970) at page 753:

> "This is not an Erie-type case where the federal court applies state law. United States Fidelity & Guaranty Co. v. Hendry Corporation, *supra* 391 F. 2d at 21. In Erie cases the court may apply the law precisely as it exists. Here the court is looking to state law to determine what the federal law should be ..... filling an interstice in the Miller Act. *Id.* at 21. It is obviously pointless to apply the state law literally when the

> whole purpose of the federal law in the first place is to *extend* the application of a general principle of state law. State law cannot protect laborers and materialmen working on federal projects because mechanics' liens do not attach on federal property. *See* United States v. Munsey Trust Co., 332 U.S. 234, 241, 67 S. Ct. 1599, 91 L. Ed. 2022 (1947). If a state cannot provide protection for laborers and materialmen working on federal projects, it is likely to have no statute allowing the award of attorney fees in an action brought in such a case. The California District Court of Appeal misconceived the reason for looking to state law and thus applied state law literally rather than looking for a state policy. The application of the state policy is more consistent with the purpose of the Miller Act than application of the literal language of state statutes."

2. *Venue.* Petitioner claims that a mandatory jurisdictional provision of the Miller Act was ignored when the Court of Appeals affirmed the Judgment against Rich as to the two shipments under the Beale Air Force Base contract which were diverted to South Carolina. Transamerica, the surety with Miller Act bond coverage for Beale Air Force Base was not held liable for these two particular shipments. The basis for this distinction is set forth in the Appellate decision at 473 F.2d, page 725. The statutory provision referred to is 40 U.S.C. Sec. 270 b (b) which provides:

> "Every suit instituted under this section shall be brought in . . . the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . ." 40 U.S.C. Sec. 270 b (b).

This provision is not jurisdictional, but only a venue provision. *U.S. ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705, 707 (2d Cir., 1966), *certiorari denied*, 385 U.S. 924.

At no time prior to the instant Petition has Rich claimed it was prejudiced by the inability to subpoena witnesses for the trial of this case, and no such prejudice exists. All the material involved in this case was ordered from Respondent under a single contract for use in the prosecution of work at Beale Air Force Base, located within the Eastern District of California. A claim against the prime contractor for payment for the materials so ordered cannot be defeated merely because the prime contractor chose to divert two shipments of many for its own convenience. To hold otherwise would defeat the remedial and liberally construed provisions of the Miller Act, *Clifford F. MacEvoy Co. v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 104 (1944), and would not achieve the just, speedy, and inexpensive determination of every action. Rule 1, Federal Rules of Civil Procedure.

3. *Subcontractor.* All of the circumstances shown by the evidence at the trial and considered on appeal—not alone the existence of more than one contract between the parties for substantial portions of the prime contract on the Beale Air Force Base project—establish the status of Cerpac as a subcontractor within the technical meaning of the Miller Act and the usage established in the building trades. MacEvoy, *supra*, 322 U.S. pages 108-109; See: *Travelers Indem. Co. v. U.S. ex rel. Western Steel Co.*, 362 F.2d 896, 898 (9th Cir., 1966).

Cerpac was a subcontractor of Rich for all plywood and all millwork on all of the many government housing projects of Rich throughout the United States between 1963 and 1966. The principal stockholders of Rich controlled and financed Cerpac. Until 1965 the two companies

were located in close physical proximity to one another, and the close personal and financial relations between the companies continued after Cerpac moved West. The Beale Air Force Base job was defined in Contract Agreements between the parties in which Cerpac took on responsibility for substantial portions of the prime contract, including specific sections of the labor and material requirements of the prime contract. The agreements were referred to by the parties as "subcontracts" throughout this period and so referred to by the president of Rich at the trial of this case. The established operating procedures developed by Rich and Cerpac during their long working relationship on jobs all across the country were utilized throughout the progress of this particular project at Beale Air Force Base. Cerpac was hardly one of the unknown multitude of ordinary materialmen against which Rich could not, or could not to be expected to, easily protect itself. See *MacEvoy, supra*, 322 U.S. at page 110.

CONCLUSION

For the reasons stated above, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court
of the
United States of America

January Term, 1974

No. 72-1382

F. D. RICH CO., INC.; TRANSAMERICA INSURANCE COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC.,
Respondent

BRIEF OF PETITIONER

PETITION FOR WRIT OF CERTIORARI FILED APRIL 13, 1973
PETITION FOR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1973

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

This review is of the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 22, 1973 and reported as 473 F.2d 720. The judgment is printed in full and attached as Exhibit "A" to the Petition for a Writ of Certiorari previously filed with this Court on April 13, 1973. With reference to that judgment in this brief, petitioner will at all times refer by page reference to the judgment as printed in Exhibit "A" to the Petition for a Writ of Certiorari.

THE ISSUES

Petitioners herein, for convenience, list the issues in the sequence used by the United States Court of Appals for the Ninth Circuit with some modification of the language used by that Court:

1. Was CERPAC, the intermediary which contracted with RICH to obtain and furnish standard sheet plywood to RICH a "subcontractor" for Miller Act purposes?

2. Does the agreement of RICH, the prime contractor to deal with INDUSTRIAL, the plywood supplier, directly, rather than through the intermediary CERPAC, for the last two shipments under the contract preclude consideration of those two shipments as the "last material for which claim is made" to establish timeliness of the Miller Act notice?

3. Is venue proper in California for shipments of plywood sent directly to South Carolina by the supplier to CERPAC for use by RICH in South Carolina

with the knowledge of all parties? (This plywood arguably was originally to be supplied to the BEALE, CALIFORNIA job.)

4. Should attorneys' fees, either at the trial level or on remand from appeal, have been awarded to INDUSTRIAL for this California claim?

5. Should prejudgment interest have been awarded to INDUSTRIAL at 8%, as stated in the invoice, rather than at 7%, pursuant to California statute?

THE FACTS

Petitioner respectfully submits that although the facts as recited by the Ninth Circuit opinion are for the most part accurate, at least one inaccuracy and the need for amplification requires a complete restatement by petitioner herein as follows.

Petitioner RICH was the prime contractor for the construction of housing units at Beale AFB, California pursuant to a contract dated October 18, 1965. Petitioner TRANSAMERICA was RICH'S surety on the job and posted the required payment bond under the Miller Act, 40 U.S.C. § 270a. In February of 1966 RICH entered into a "contract agreement" with CERPAC whereby CERPAC agreed to obtain and supply quantities of exterior plywood of standard dimensions and widths. Although not directly involved in this law suit, it should also be noted that RICH awarded CERPAC a contract for all millwork to be used at Beale AFB.

From 1961 through 1968 petitioner RICH built numerous Federal housing projects, and until its bankruptcy in the Fall of 1966 CERPAC furnished much of the plywood and millwork for these projects. F. D.

RICH, JR. testified that for a period of time shareholders of the F. D. RICH CO. were shareholders in a company by the name of WINTER REALTY and that WINTER REALTY for a period of time between 1963 and probably early 1965 held up to 40% of the stock of CERPAC in a voting trust agreement. During that period of time the F. D. RICH CO. was somewhat familiar with the financial condition of CERPAC (R. T.–F. D. RICH, JR. – 5, 6, and 7). Edward Cervi, President of CERPAC, was deposed and his deposition was submitted in evidence in this action. Therein Mr. Cervi confirmed that he had acquired all of the stock in his company about a year prior to its bankruptcy, which means that he acquired it in the Fall of 1965. (Cervi depo pages 7 and 8.) Cervi's testimony substantially agrees with Rich's testimony and establishes that at the time of the February 1966 RICH-CERPAC contracts there was no interlocking relationship or any other kind of relationship between RICH and CERPAC except the contracts for millwork and plywood. The foregoing is confirmed by Finding of Fact number V.

On February 22, 1966, CERPAC placed a single order with respondent INDUSTRIAL for a specific amount of plywood which both parties probably understood was intended to be used at Beale AFB for F. D. RICH. INDUSTRIAL was what is known in the trade as a "desk wholesaler" and it in turn obtained orders for the plywood from two supply sources which happened to be Diamond National and Clear Fir. The CERPAC-INDUSTRIAL designation for these orders was "Beale 647". The shipments to RICH at Beale

began on approximately March 10, 1966, and were invoiced as shown in Finding of Fact number XIX.

The plywood covered by INDUSTRIAL invoices E-280 and E-281 was not sent to Beale AFB but rather were sent by railroad car to another RICH project at Charleston, South Carolina. (Petitioner TRANSAMERICA was not the surety on that job.) Mr. Fowler, INDUSTRIAL'S witness, testified that the plywood covered by these two invoices was loaded onto a railroad car at *the mill* supplying the lumber to INDUSTRIAL and sent to the freight station at INNESS, SOUTH CAROLINA with the knowledge and blessings of INDUSTRIAL. (R. T. 45-46) INDUSTRIAL negotiated change orders with CERPAC regarding these shipments although they apparently retained the "Beale 647" designation. Note that this all transpired in March of 1966.

In April (R. T. page 47) or May R. T. page 74) of 1966 INDUSTRIAL adviser CERPAC that it would do no more business on open-account with CERPAC because it had not been paid by CERPAC for certain shipments (Cervi testified in his deposition that he had in fact been paid by RICH for all of the materials being supplied by INDUSTRIAL before this time– (Cervi's depo. page 68). Thereafter, RICH agreed to be billed directly for orders E-284 and E-285 bearing invoice dates of June 10th and June 28th, 1966 respectively and the plywood was shipped to Beale AFB and invoiced directly to F. D. RICH. At trial RICH admitted a direct contract with INDUSTRIAL for the last two invoices which totaled $6,976.33. These last two ship-

ments arrived at Beale on May 16th and June 23rd, 1966.

The parties stipulated at trial that the only Miller Act notice sent to RICH was dated July 13, 1966 and received by RICH on July 15, 1966 (R.T. page 17).

The trial court found in favor of INDUSTRIAL for the entire $31,402.97 calculated in Finding XIX. The voluminous findings of the District Court are a part of the record on this appeal. The decision of the Ninth Circuit affirmed the trial court in all particulars except that it ruled that the amount due was liquidated and therefore should bear interest at the rate of 8% as opposed to the 7% awarded by the District Court and the Ninth Circuit also for the first time ruled that attorney fees would be recoverable in this Miller Act suit brought in California. The court remanded for consideration by the District Court the amount of the attorney fees and also for consideration of the question as to whether it wished to award attorney fees for work on appeal.

After hearing, on April 16, 1973, the District Court awarded judgment in the total amount of $66,999.59 against F. D. RICH CO., and a lesser amount against TRANSAMERICA. Although the judgment does not specifically so designate, the parties to this review will stipulate that said figure includes a 25% of the recovery attorney fee for work done through the trial level and an additional $3500 fee awarded for work on appeal, all pursuant to the District Court finding on April 16, 1973.

The April 16, 1973, judgment by the District Court is found in Exhibit "1" to this brief.

WAS CERPAC A SUBCONTRACTOR?

The law is well settled that if CERPAC was merely a supplier or materialman within the meaning of the Miller Act, then INDUSTRIAL would have had no Miller Act rights against RICH since it would simply have been a supplier to a supplier *(See Aetna Cas. and Sur. Co.* v. *Gibson Steel Co.* 382 F. 2d 615: *Clifford F. Macevoy Co.* v. *United States* 322 U.S. 102; *Brown & Root Inc.* v. *Gifford Hill* 319 F. 2d 65 for examples).

The decisions give us no definitive definition of the difference between a materialman and a subcontractor. Petitioner submits that the test apparently applied by the Ninth Circuit, namely – "The distinction between subcontractors and materialman turns on the subtantiality and importance of the relation between the middle party and the prime contractor." – is not helpful in this already litigation prone construction field and ought not be accepted. This approach will in most, if not all, circumstances require a law suit. We respectfully submit that a more workable approach is that suggested in the *United States for the use of Harold Bryant* v. *Lembke Construction Co.* 370 F. 2d 293. Therein the court ruled that a supplier who furnished concrete to the prime contractor was merely a materialman and not a subcontractor even though he agreed to supply all of the concrete necessary for the government construction job. The language of the court is significant–"In this case Adams undertook to furnish concrete. There was by this undertaking no substantial delegation of any portion of Lembke's contract. The concrete Adams undertook to deliver was in no way a "custom-

ized" material thus bringing Adams within the purview of those cases holding that a supplier of such "customized" material is a subcontractor, even though he does not perform many services in reference to installation. All Adams did was deliver concrete. Admittedly, he was to deliver all the concrete needed for the job and the concrete had to conform to the specifications in the prime contract. This does not however change Adams' status from a materialman to a subcontractor. The reference in Adams' contract to the specifications in the prime contract is "merely descriptive of what is to be furnished" (citing cases) *(Lembke* 370 F. 2d 293 at 295-296).

The Lembke test is something that can be understood in the trade. The materialman's contract usually of necessity, and for convenience, refers to the master or prime contract even as CERPAC's did here. The plywood furnished by INDUSTRIAL to CERPAC was a standard item that was in no way "customized". In fact, the plywood was so standard that it was not even seen by either CERPAC or INDUSTRIAL but was merely ordered by INDUSTRIAL by telephone from standard plywood suppliers, eg. Diamond National and Clear Fir (R.T. pages 23-28). The Circuit Court opinion seeks to tie in the millwork contract between RICH and CERPAC, a contract with which INDUSTRIAL had no dealings whatsoever. Furthermore, the millwork contract was merely introduced into evidence and there was no testimony as to its requirements (R.T. 15, Exhibit #4). Accordingly, there is actually no testimony before the court as to whether the millwork called for customized work or non-customized work.

We repeat that the construction industry ought to be favored with a legal approach which can be readily applied and understood. Contrary to the suggestion of the Circuit Court that CERPAC was not an ordinary materialman but was in a " . . . special, integral, almost symbiotic relationship to RICH . . . ", the situation was actually a typical one of a materialman supplying a portion of the prime contractor's requirements. We have already outlined the testimony indicating that there was no special relationship between the two as of the time this contract was signed, and thereafter.

RICH concedes now as it did at trial that it is liable for the last two shipments of plywood on a direct contract theory. However, since CERPAC was and should have been determined to be a materialman as a matter of law, petitioner suggests that it follows that the remainder of INDUSTRIAL'S claim which was based upon a Miller Act cause of action should have been denied.

THE MILLER ACT NOTICE WAS NOT TIMELY

The Act provides that within 90 days of the last furnishing of materials, those who have furnished supplies to subcontractors and who have no contractual relationship to the prime contractor must notify the prime contractor of their materialman's claims. *40 U.S. Code Annotated § 270b(a)*. The notice provision is a matter of substance, and the decisions infer that it should be literally applied. It may be as arbitrary a rule as that defining a statute of limitations in a negligence action but it has at least an equivalent philosophical backing.

"Certainly Congress intended by passing the Miller Act to afford subcontractors and materialman, no doubt in substitution for the mechanic's lien generally available against private property owners, a liberal remedy against the general contractor. But, the provision for notice indicates that Congress did not intend to strip the prime contractor, who is primarily liable, of all protection. The notice provision permits the prime contractor, after waiting 90 days, safely to pay his subcontractors without fear of additional liability to subcontractors or materialman. *(U.S. for the use of Monroe-Langstroth* v. *Praught* 270 F. 2d 235, at 237, 238). It has also been said that " . . . once 90 days have elapsed without such notice, the contractor ought to be free to pay the subcontractor for his work without risk of liability to the supplier. A less strict interpretation of the notice proviso "would lead either to double payments or to interminable delay in settlements between contractors and subcontractors to guard against these – in either case with attendant prejudice to all concerned". (citing cases) *(United States for the use of I. Burack, Inc.* v. *Sovereign Construction Co., Ltd.* 338 F. Supp. 657 at 661).

An examination of the recapitulation shown in finding number XIX illustrates that if the last two shipments of plywood (E-284 and E-285) which were invoiced directly to F. D. RICH are excluded, the next preceding shipment E-283, which bears an invoice date of April 8, 1966 covering materials actually received at the job site on April 1, 1966 (Exhibit 3 page 35) is clearly more than 90 days prior to the July 15th Miller Act notice.

The Circuit Court handled the matter rather summarily and indicated that since *CERPAC* and *INDUSTRIAL* had labeled the last two shipments "Beale 647" and they were furnished to RICH at Beale, the admitted fact that the last two shipments were a matter of direct contract between RICH and INDUSTRIAL was inconsequential. (We are not really told why it was inconsequential.) In fact, we respectfully submit that the consequences of this ruling are quite severe. In the first place the Circuit Court's approach means that the prime contractor deals with a former supplier to one of his materialman or subcontractors at his peril. His independent direct contract may revive otherwise expired Miller Act claims, which is exactly what the Circuit Court ruled happened here. This conclusion was rejected in *United States for the use and benefit of Harris Paint Co.* v. *Seaboard Surety Co.* 437 F. 2d 37. Therein the facts were similar to those now before us and the Circuit Court affirmed the granting of a summary judgment for defendant indicating: "Plaintiff stands or falls on one proposition—whether the purchase and use by a contractor of materials from a supplier in the completion of a subcontractors job, without more, extends the time for giving the notice under the Miller Act by the supplier until 90 days after the last of such material is furnished to the contractor. And on that proposition, plaintiff fails." *(437 F. 2d 37 at page 38)*. The court further indicated ". . . that it was the intent of Congress to fix a time limit after which the prime contractor could make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and

materials to the subcontractor. It is not consistent with either this intent or the mechanics of the statute if a prime contractor is required to choose between withholding payment to his subcontractors indefinitely or acting at his peril. . ." *(437 F. 2d 37 at 39).*

Again looking to the practicality of the matter it is very clear that INDUSTRIAL and RICH understood that they were embarking on an entirely new relationship with the direct contract for invoices E-284 and E-285 as well as for the Door contracts which were paid directly. Mr. Fowler, a salesman for INDUSTRIAL, indicated that he called CERPAC in approximately April of 1966 and told CERPAC that INDUSTRIAL would not ship any more materials until it had been paid by CERPAC for past shipments (R.T. page 47). Mr. Van Baest, and officer, director and comptroller of INDUSTRIAL, indicated that he talked with CERPAC toward the end of May of 1966 and said there would be no more dealings with CERPAC on an open account (R.T. pages 71 through 74). In fact, INDUSTRIAL took a note from CERAC dated May 24, 1966 for the amount due from CERPAC to INDUSTRIAL (R.T. page 82). Invoices E-284 and E-285 hadn't even been prepared at that time (R.T. page 84), then, of course, the plywood, contrary to past practices, was invoiced directly to the F. D. RICH CO. As further evidence of this entirely new relationship Mr. Van Baest testified that although they had charged CERPAC $82.00 per thousand square feet for the plywood, they charged RICH $84.50 per thousand feet, for the two invoices sent in June. Mr. Van Baest stated that the $2.50 difference—per thousand square feet—was to

be paid to CERPAC as a commission (R.T. page 76). They had not previously paid CERPAC a commission but Mr. Van Baest explained, "... we pay our commission man what we receive, the money from our *customers.*" (Emphasis added–R.T. page 77).

Petitioner can find no authority permitting such a new direct contractural relationship with the materialman for supply of materials at a different price than he had been supplying them to his contract, and with a difference in commission arrangement, to serve as a basis for exposing the prime contractor to otherwise stale Miller Act type lien claims. Appellant suggests that the decisions cited earlier in the discussion of this point are to the contrary and suggest a better rule. *See also U.S. for the use of J. A. Edwards & Company, Inc.* v. *Peter Reiss Construction Co.* 237 F. 2d 880.

Section 270b of the so-called Miller Act in fact recognizes two entirely different relationships, one wherein the materialman has a direct contract with the prime contractor and one wherein he does not. There is nothing in the statute suggesting that the two should be run together so that a direct contract revives an otherwise stale Miller Act claim. Indeed there would be very little reason for the distinction in the statute if that were the intent.

We respectfully suggest that the *Harris* rule is the most workable and represents the intent of Congress.

VENUE–THE SOUTH CAROLINA SHIPMENT

The materials shipped to Inness, South Carolina in March of 1966 pursuant to invoices E-280 and E-281 were sent there with the full knowledge, consent, and

actually at the direction of INDUSTRIAL which asked the mill, its supplier, to load the plywood on a railroad car headed for Inness, South Carolina. (R.T.-26.) The materials were utilized on a government project in South Carolina. The bonding company was not petitioner TRANSAMERICA herein. While the case law lays down the caveat that the material need not be actually used on the job site intended it does flatly state that the supplier must "in good faith and under reasonable belief" believe that the material was intended for ultimate use under the contract for which the bond attaches *(Westinghouse Electric Supply Co.* v. *Endebrock-White Co.* 275 F. 2d 57; *McDermott* v. *Woods Construction Co. 224 F. Supp. 406;* and *U.S. for use of Pomona Tile Manufacturing Co.* v. *Kelly* 456 F. 2d 148). In this instance INDUSTRIAL, before the plywood in question was shipped, knew as a fact that it was intended for use and would be used in Inness, South Carolina (not Beale AFB). Indeed INDUSTRIAL filed action number 67-151 in the District Court of the United States for the District of South Carolina, Charleston Division claiming the $6,808.32 representing invoices E-280 and E-281. That action was off calendar at the time the instant action was tried but it does show that plaintiff INDUSTRIAL itself believed that Charleston was the proper jurisdictional basis for its suit (See discussion regarding this matter R.T. pages 9 and 10).

RICH and TRANSAMERICA preserved the issue in their pretrial statement and moved for dismissal of the Inness portion of the suit from this action at the beginning of the trial. That motion was denied (R.T.

page 10) and the Circuit Court decision upholds that denial.

40 U.S.C.A. § 270 states in part that every suit instituted under this Section shall be brought ". . . in the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere. . .*" (Emphasis added). *In U.S. for the use of Vermont Marble Co.* v. *Roscoe-Ajax Construction Co.* 249 F. Supp. 439 and in *U.S.* v. *Rondout Marine, Inc.* 312 F. Supp. 846 the courts interpreted this statute as more than a so-called venue requirement and in fact stated that it was mandatory and jurisdictional.

In *Rondout* the court reasoned that . . . since such suits sometimes involve disputes as to performance, the venue requirement facilitates the subpoenaing of essential witness who participated in the work at the contract site" *(See also U.S. for use and benefit of Capolino Sons.* v. *Electronic & Missile Facilities, Inc.*, 364 F. 2d 705, 707).

The Circuit Court opinion sems to discount all of the foregoing simply because the plywood was ordered, strictly as a matter between CERPAC, INDUSTRIAL and its supplier, for the Beale 647 contract. We submit that it makes no particular difference where the material was originally intended to go. The testimony clearly indicates that before the materials were even loaded all the parties agreed to ship the material for us in South Carolina. *That was the contract destination.*

We respectfully submit that the District Court, Charleston Division, was and is the only proper place for the trial of INDUSTRIAL'S law suit with regard to the two invoices shipped to Inness.

ATTORNEYS' FEES

The Circuit Court correctly noted that the Miller Act does not speak to the question whether prevailing parties may recover attorneys' fees as additional damages or costs, nor is there legislative history on the issue. The Circuit Court favored the philosophy enunciated in *Transamerica Insurance Co.* v. *Red Top Metal, Inc.* 384 F. 2d 752. Therein, as noted by the Circuit Court, the Federal court looked to state policy and specifically looked to see if state law allowed a supplier on 'private projects' to recover attorneys' fees. Petitioner submits that this philosophy is peculiar in that the court seems to be merging an *Erie* v. *Tompkins* philosophy with the precise words of a Federal statute. Legally this is a peculiar marriage. This is not an *Erie* v. *Tompkins* situation. The rights flow only from a Federal statute.

Some other courts have agreed with the *Red Top* philosophy and others have completely disagreed. It has been held by some courts that State law cannot be incorporated into Federal law; that State law cannot determine the question of recovery of attorneys' fees in Miller Act litigation and thus the correlary has been created that, the Miller Act being silent regarding attorneys' fees, attorneys' fees are not recoverable in Miller Act litigation. *See United States for the use of Getz Bros. & Co.* v. *Markowitz Bros.* 383 F. 2d 595; *United States for the use of E. J. Bartells Co.* v. *Hoffman Construction Co.* 163 F. Supp. 296; *United States for the use of Eoff Electric Co.* v. *Mann* 196 F. Supp. 185.)

This court in *Fleischmann* v. *Maier Brewing Co.* 386 U.S. 714 18 L ed. 2d page 475 has recently stated, rather

clearly we thought, the general rule that ". . . attorney fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore." (at page 478). Several minor exceptions to this principle were enunciated but the Miller Act was not one of them. The court therein seemed to be saying, quite clearly, that Congress knows how to provide for the recovery of attorneys' fees in a statute if it so chooses—it had not so chosen—and therefore the courts would not judicially legislate. We submit that this makes eminent good sense in that throughout the Federal statutory system and indeed the statutory systems of most if not all States, the general rule is that attorneys' fees are not recoverable and conversely a statute allowing recovery is the exception. Historically, petitioner knows of few examples of judicial erosion of this precept.

California law states the general rule that attorneys' fees are not recoverable in the absence of a contractual agreement or a very special statute *(Reid* v. *Valley Restaurants, Inc.* 48 Cal. 2d 606, 610). Similarly attorneys' fees are not recoverable as costs except where expressly allowed by statute (and there are few examples) *(Stockton Theaters Inc.* v. *Palermo,* 124 Cal. App 2d 353, and *LaMesa-Springs Valley School District* v. *Otsuka,* 57 Cal.2d 309).

It is true that *California Government Code* Section 4207, in effect at the time of the contract here and at the time of the trial, provided for recovery of attorneys' fees in State actions on the bond of public work contractors for State and local government authorized jobs. This section had no application to private jobs and, of course, as noted in the circuit court opinion the State

Court of Appeals, Third District, ruled that the statute had no application to private construction projects or to projects of the United States (*B. C. Richter Construction Co.* v. *Continental Casualty Co.*, 230 Cal. App. 2d 491, 506). The Circuit Court herein not only disagreed with and ruled contrary to the interpretation of the California Government Code given by California's own Appellate Court but also created as a matter of first impression some new law when it suggested to the District Court that, on remand, attorneys' fees for work on appeal could be awarded. As stated previously, the District Court judge did on April 16, 1973 enter his order allowing $3500 to INDUSTRIAL as attorneys' fees for its work on the appeal. The $3500 figure is included in the total judgment filed on April 16, 1973.

However, as a general rule in California, attorneys' fees are not allowed for work on appeal and accordingly, if the Federal Court was purporting to look to State law (the decision really does not say what the basis for the suggestion is) it seems that the court created something new. *California Code of Civil Procedure*, Section 1034 governs costs on appeal. Attorneys' fees are not therein mentioned and accordingly are not recoverable. The California Supreme Court has previously denied attorneys' fees on appeal when presented as a "necessary disbursement" (*Moss* v. *Underwriters Report Inc.*, 12 Cal. 2d 274).

Petitioner suggests that Congress has had ample opportunity to amend the Miller Act to include attorneys' fees if it was Congress' intent. The decisions have been in conflict and petitioner respectfully suggests that

this court indicate herein that it meant exactly what it said in the *Fleischmann* case. Attorneys' fees in Miller Act cases should not be recoverable until or unless the Federal statute is amended to so provide.

INTEREST

The Circuit Court decided that each element of damages was specified by invoice and thus was at least reasonably calculable within the meaning of the California statute. (Cal. Civil Code 3287 and 3289). However, we submit that the matter is not so clear. INDUSTRIAL during trial acknowledged a credit due to CERPAC in the amount of $1,667.95. It chose arbitrarily to deduct that credit from the Inness invoices (See R.T. pages 7, 8, and 29). There was an issue during trial as to whether that credit should be deducted from the Inness invoices or from some of the other invoices. There was also the question, of course, as to whether the Inness invoices should be considered at all. Since we are today still contending and we believe rightly so, that the matter of whether anything at all is owed on the Inness invoices should be litigated in South Carolina and the question remains whether the credit should be applied in that law suit, in this law suit, or wherever, petitioners argue that the amount was hardly liquidated or calculable.

Accordingly, we submit that the District Court's decision to, in its discretion, award 7% interest for an unliquidated amount under California Civil Code Section 3287(b) was not only reasonable but proper.

CONCLUSION

Petitioners earnestly submit that the questions presented herein are of great importance to the construction industry in general, an industry fraught with litigation. The rules of reason and law suggested by petitioner herein are of a practical nature and, if adopted, would tend to eliminate an important measure of uncertainty in the application of the Miller Act. Regarding the attorneys' fees issue specifically, we submit that your judicial pronouncements have been clear that the statute does not authorize recovery and of course any amendment to the philosophy is for the legislature.

Petitioner submits that RICH and TRANSAMERICA are liable only for the sum of $6,976.33 representing the amount due for materials supplied pursuant to direct contract with INDUSTRIAL as aforementioned together with applicable interest to date of satisfaction of judgment. The matter of the shipments to Inness, South Carolina should be disposed of in the pending action filed there by INDUSTRIAL.

DATED: November 15, 1973.

Respectfully submitted,

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CERTIFICATION

I certify that in connection with the preparation of this brief I have examined all applicable Federal rules of appellate procedure and that in my opinion the foregoing brief is in compliance with those rules.

OTTO ROHWER

RONALD N. PAUL

LAWRENCE COCHBERG

SUPREME COURT, U. S.
FEB 26 1973

IN THE

Supreme Court of the United States

January Term, 1974
No. 72-1382

F. D. RICH CO., INC.; TRANSAMERICA INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1973

BRIEF OF RESPONDENT

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IN THE

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F. D. RICH CO., INC.; TRANSAMERICA INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI GRANTED OCTOBER 9, 1973

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

(a) Nature of the Case, Court Proceedings and Disposition in the Courts Below

This case arises out of the sale of building materials for construction of federal government housing at Beale Air Force Base near Marysville, California. The District Court had jurisdiction based on diversity of citizenship, 28 U.S.C. Sec. 1332, and under the Miller Act, 40 U.S.C. 270a, et. seq.; the Court of Appeals had appellate jurisdiction under 28 U.S.C. Sec. 1291. This Court has jurisdiction for review on certiorari under 28 U.S.C. 1254(1).

Following the trial, the District Court awarded Respondent, Industrial Lumber Co., Inc. ("Industrial"), judgment for the full amount of the unpaid balance due on its contract to furnish all exterior plywood for the federal housing project, together with interest on an "unliquidated" claim at the rate of seven percent (7%) per annum. While the District Court found that a reasonable and necessary attorneys' fee would be twenty-five percent (25%) of the principal and interest recovered, attorneys' fees were not awarded. Two of the original defendants, Petitioners F. D. Rich Co. ("Rich"), the prime contractor, and Transamerica Insurance Company ("Transamerica"), the surety with Miller Act payment bond coverage on the project, appealed the judgment, challenging the status of a third defendant, Cerpac, Inc. ("Cerpac") as a subcontractor, the timeliness of notice under the Miller Act, and the venue of the case on one portion of Industrial's claim. Industrial cross-appealed to increase the amount of interest allowed to that permissible on a "liquidated" claim, and to recover attorneys' fees in the amount found reasonable by the District Court but not awarded.

On Appeal, the District Court was sustained as to the status of Cerpac as a subcontractor and the timeliness of notice. The District Court judgment was modified so as to exclude Transamerica from liability for the amount of two shipments diverted by Rich from the project at Beale Air Force Base for use on another government construction site in South Carolina. On Cross-Appeal, Industrial was awarded interest for a liquidated claim at the increased rate of eight percent (8%) per annum from the date payment was due, and the case was remanded to the District Court for further consideration of an award of attorneys'

fees in light of the appellate decision that such fees were definitely to be awarded. On remand, the District Court entered judgment, modified as to Transamerica, with interest at the increased rate and attorneys' fees amounting to twenty-five percent (25%) of Industrial's recovery, together with an increment of $3,500.00 for attorneys' fees through the appeal. Petitioner's motion for stay of execution pending application to this Court for certiorari was denied by the District Court and judgment entered accordingly on April 16, 1973. Upon receiving payment from Rich, Industrial satisfied the judgment of record.

(b) Statement of Facts Relevant to the Issues, With References to the Record*

Between 1961 and 1968, Rich built a considerable number of federal housing projects throughout the United States and its possessions. (Rich 4, 12; T15-16, R127) During the period between 1963 and 1966, Cerpac provided all the millwork and plywood portions of these housing projects. (T15-16; Rich 12) Edward Cervi, the president of Cerpac, had a close personal and working relationship with Rich, its officers and personnel. (T15-16, Rich 5, 6, 18; R440) Through a wholly owned subsidiary, Winter Realty, the principals of Rich held a substantial voting interest in Cerpac stock related to financing the company and were completely familiar with its operations and financial condition (Rich 4, 6; R440) and during a sub-

*The Reporter's Transcript of testimony at trial will be abbreviated "T". The testimony of Frank Rich, Jr., given in the immediately preceding trial of a companion case and admitted in evidence in this case by stipulation (T33-34), will be abbreviated "Rich". The deposition of Edward Cervi, admitted in evidence in this case by stipulation (T16, 35) will be abbreviated "C". The Clerk's Record (Pleadings) will be abbreviated "R".

stantial period of time supplied Cerpac's working capital. (Rich 5-6)

On October 18, 1965, Rich contracted with the United States to build 337 family housing units at Beale Air Force Base. (R384, 441; T14) Transamerica was the surety which provided the payment bond required under the Miller Act, 40 U.S.C. Sec. 270a, for the project. (T14; R384, 388, 441) As in the past, Rich awarded Cerpac two contracts for substantial portions of the work at Beale. One contract, dated February 8, 1966, covered all the required custom millwork and the other contract, dated March 7, 1966, covered all the exterior plywood. (T14, R384, 441) In the words of Frank Rich, Jr., president of Rich, referring to Cervi in testimony at trial:

> "He was awarded the millwork subcontract and the plywood subcontract." (Rich 9)

Both Cerpac contracts incorporated by reference specific portions of the prime contract between Rich and the government (Rich 9; R384, 441) and were similar to those used by Rich and Cerpac on federal projects throughout the period. (Rich 11;T15-16) In addition to the millwork which included all exterior doors, Cerpac was to furnish 324,000 square feet of ½" and 324,000 square feet of ⅝" exterior plywood at a fixed price. (R384; T14-15)

On February 22, 1966, Cervi placed a single order with Industrial, designating the order "Beale 647", and covering all the exterior plywood required by Rich at Beale Air Force Base. (R395) Industrial, a "desk broker" which purchases wood products and material from producing mills for resale (T38; R439), acknowledged the complete Cerpac order at a fixed price on February 24, 1966. (T38; R439)

The Order "Beale 647" required schedule shipments by truck to Rich at Beale Air Force Base. Industrial ordered all the ½" plywood from Diamond National Plywood, and all the 5/8" plywood from Clear Fir Sales Co. These two mill orders were each referenced "Beale 647", and the respective mills were also assigned Industrial numbers E278 through E286 for ½" plywood and E288 through E297 for 5/8" plywood. Each of the numbers assigned, to be used as necessary, represented one truckload of plywood under "Beale 647". (R442-443; T20-27)

The shipments to Rich at Beale Air Force Base started approximately March 10, 1966. (R443) As each truck arrived at Beale Air Force Base, a receipt was executed for the delivery by a Rich representative on the site, showing the truckload quantity and naming Industrial as the source. (R393(a), 443)

Shortly after the shipments started, Rich told Cervi of the need for more plywood at one of their government housing projects located in Charleston, South Carolina, where Rich and Cerpac had the same arrangement as at Beale Air Force Base. (C33; R389-390) Because the market price was high at the time and, as Cervi testified, because "we had the material at Beale already covered . . . we took some of the plywood from Beale and shipped it down there." (T110;C33, Lines 10-13, 15-16) Cervi advised Industrial of the necessary diversion and, on March 14, 1966, Industrial obtained approval from the mill and effected the change of destination under "Beale 647" pursuant to Cervi's explanation and instructions. (T45-46) Two truckloads of plywood were then delivered to Rich under "Beale 647" (T11) at a Charleston freight station in Inness, South Carolina. (R444) The shipment was in-

voiced "Beale 647" to Cerpac after delivery in late March, 1966, at a price unchanged from that under the single "Beale 647" order except for additional freight charges. (T28-29, 58) No change in quantity occurred on "Beale 647" due to the Charleston shipment, and deliveries continued to Rich at Beale. (R384, 441; T14)

During April and May, 1966, Cerpac fell behind in payments to Industrial for plywood shipments to Rich under "Beale 647". (R444; T47, 72) Some payments were received by Industrial and applied to Cerpac's account, but Cervi was told that Industrial would not deliver the two final truckload shipments under "Beale 647" until satisfactory assurance of payment was given or the account brought current. (R444-445; T17-20, 73) Conforming to a "procedure" used by Rich and Cerpac "on other jobs" with other suppliers (C45-47), Cervi told Industrial that invoices for the last two shipments under "Beale 647" could be sent directly to Rich for payment with the approval of Rich (R444-445; T49, 74, 75) and with Cerpac to receive its customary profit as a commission from Industrial. (T58, 77) No new purchase orders were used in connection with the final truckloads and the order designation remained "Beale 647". The last two deliveries to Rich at Beale were made on May 16, 1966, and June 23, 1966, respectively. (R445)

Industrial invoiced the two final shipments directly to Rich, with copies to Cerpac, (R445, T49) under "Beale 647" on June 10, 1966, and June 28, 1966, respectively. (R445) As was the case with all Industrial invoices, the final two invoices sent directly to Rich were payable in full within 30 days with interest at the annual rate of 8% after

the due date, allowing a 2% price discount for payment within 20 days. (R449) The price to Rich on the last two truckloads was the same price that Rich had originally agreed to with Cerpac. (R384, 441; T14, 49, 76)

In addition to all of the plywood delivered under "Beale 647", Industrial also provided Rich with all of the exterior doors for the project at Beale Air Force Base under the following circumstances. (R446) As early as March, 1966, Cervi and Industrial had discussed the need for exterior doors at Beale Air Force Base, and Industrial had submitted a price quotation and samples. (T48-49) But by May, 1966, when Cervi sought to order the doors, Industrial took the same position as it had with respect to the plywood shipments under "Beale 647" on which payments were delinquent, and refused to deliver doors until satisfactory payment could be assured. (T50, R446) Cervi then suggested the same procedure whereby Industrial would invoice Rich directly for doors, stating Rich had approved. (T50) The doors were deleted from Cerpac's millwork contract by change order (Rich 13; R446) and Rich forwarded to Industrial a Contract Agreement for the doors, bearing a date of June 27, 1966, one day prior to the date of the last plywood invoice under "Beale 647"; this Contract Agreement was signed and returned by Industrial on June 30, 1966. (T14, 24; R446)

On "Beale 647", the direct invoices to Rich dated June 10, 1966, and June 28, 1966, covering the last two plywood shipments were not paid within the 30 day discount period. Industrial therefore contacted both Cerpac and Rich, including Frank Rich, Jr., on several occasions concerning the delinquency. (R447; T54, 75, 85) Despite the approved

direct invoicing procedure, Rich refused to pay for all of the "Beale 647" plywood which had been delivered; instead, Rich asked Industrial to drop the Miller Act claim it had made on all unpaid plywood shipments in return for payment on the last two deliveries. (T55) Industrial, then, refused to ship the doors despite the Contract Agreement. (R446; T54, 55) The last plywood delivery to Rich at Beale Air Force Base under the order "Beale 647" had been made on June 23, 1966. On July 13, 1966, Industrial had formally notified Rich in writing of all nine (9) unpaid plywood invoices and the balance due under "Beale 647", by certified mail which Rich had received July 15, 1966. (R386, 447-449; T17-18, 85)

Rich and Industrial subsequently worked out an arrangement for payment for doors using a domestic letter of credit (T55), and Cerpac filed bankruptcy in October, 1966. (T85-86) The Complaint in this action was filed by Industrial on March 13, 1967.

ARGUMENT

Cerpac As Subcontractor

(a) *Subcontractor Status Not Necessary.*

Under the Miller Act, only when there is "no contractual relationship expressed or *implied* with the contractor furnishing [the] payment bond," is it required that one dealing with a subcontractor give notice of his claim within ninety (90) days after supplying the last of the material. 40 U.S.C. 270b(a) The direct relationship itself furnishes the prime contractor with the necessary information required by the statute, and a practical means of self protection concerning unpaid materialman claims. *MacEvoy v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1943); *U.S. ex rel.*

Foley & Bro. Inc. v. U.S. Fidelity & Guaranty Co., 113 F.2d 888, 890 (2nd Cir., 1940).

In this case, based upon all the circumstances shown by the evidence, the District Court found that an implied contractual relationship arose between Rich and Industrial (R455); this finding is not clearly erroneous. Rule 52(a), Fed. Rules Civ. Pro. Standing alone, this implied relationship disposes of the first two issues raised by Petitioners concerning the status of Cerpac as a subcontractor and the timeliness of notice to Rich.

This Court has recognized and defined implied contracts as "such as arise by legal inference and upon principles of reason and justice from certain facts, or where there is circumstantial evidence showing that the parties intended to make a contract." *McDonald v. Thomson*, 184 U.S. 71, 74 (1902); *U.S. ex rel. Hargis v. Maryland Casualty Co.*, 64 Fed. Supp. 522, 527 (D.C. Cal., 1946). In *Hargis, supra*, the application of four distinct but related legal theories (implied contract, third party beneficiary contract, estoppel, and actual notice) to the factual pattern there presented supported the conclusion that notice was not needed when the conduct of the parties demonstrated that the prime contractor had entered into a direct contractual relationship with the use plaintiff in a Miller Act case.

In this case Rich has conceded direct contractual liability to Industrial for the last two shipments of plywood under "Beale 647". Rich insists, however, that its approval of direct invoicing is limited to only these last two shipments. The District Court took a broader view of the relationship which had developed between the parties; in the view of the trial judge, the acceptable evidence showed

Rich had orally approved direct invoicing at the time because Rich knew Industrial would not complete deliveries under "Beale 647" unless paid for all of the order, including pre-existing delinquencies. The "procedure" Rich and Cerpac had used on other federal projects was relied on by Industrial, and the final deliveries were made and accepted by Rich at Beale Air Force Base. Similarly, Rich knew that Industrial was not going to perform under the direct Contract Agreement for exterior doors at Beale Air Force Base, because of the delinquencies under "Beale 647", at the time Rich demanded that Industrial give up its Miller Act claim for all unpaid plywood invoices in order to collect for the last two deliveries.

Respondent respectfully submits that, when Industrial sent its final plywood invoice to Rich, dated June 28, 1966, and two days later returned the executed Contract Agreement for doors, the overt conduct of the parties and timing of events, in the light of all the testimony found creditable, demonstrates and justifies the legal inference that an implied contract for the entire balance due on "Beale 647" had come into existence and that the parties intended to make such a contract. Here Rich not only knew that all of the plywood had been delivered in good faith and receipted for, but through all negotiations from the time direct invoicing was approved, through the period that Industrial refused to perform on the Contract Agreement for doors, Rich had all the details of the unpaid claim of Respondent. The contemporaneous conduct and knowledge of the parties, and the actions of Rich and Industrial with respect to both plywood and doors, made any additional notice unnecessary.

(b) *Cerpac Was a Subcontractor.*

In *MacEvoy v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102 (1943), this Court defined a "subcontractor" for purposes of the Miller Act as follows, at 322 U.S., p. 109:

> ". . . as established by usage in the building trades, a subcontractor is one who performs for and takes from the prime contractor a *specific part* of the labor or *material requirements* of the original contract, thus excluding ordinary laborers and materialman." (emphasis added)

The Petitioners argue, however, that no acceptable definition exists and that a subcontractor should be limited to one who does "customized" work because this word was used in *U.S. ex rel. Bryant v. Lembke Construction Co.*, 370 F.2d 293, 296 (10th Cir., 1966) and Petitioner believes it can be understood in the trade.

In *Lembke*, however, the decision turned not upon "customized" material but upon the conclusion that, at 370 F.2d 293:

> "There was by this undertaking no *substantial delegation of any portion* of [the prime] contract." (emphasis supplied)

In *Lembke*, the Court referred to *Basich Brothers Construction Company v. United States*, 159 F.2d 182 (9th Cir., 1946) as a case showing that a supplier of "customized" material was a subcontractor. *Lembke, supra*, p. 295 note 6. The appellate court in this case accurately determined the focal point of its decision in *Basich* when stating that the "distinction between subcontractors and materialmen turns on the substantially and importance of the relation between the middle party and the prime contractor." *U.S. ex rel. Industrial Lumber Co. v. Rich*, 473 F.2d 720,

723 (9th Cir., 1973); citing: *Basich, supra; Lembke, supra;* and *Aetna Cas. & Sur. Co. v. U.S. ex rel. Gibson Steel Co.*, 382 F.2d 615, 617 (5th Cir., 1967).

The relationship between Cerpac and Rich was hardly "typical". The District Court and the Appellate Court were "correct in looking at the total picture here". *U.S. ex rel. Wellman Engineering Co. v. M.S.I. Corp.*, 350 F.2d 285, 286 (2nd Cir., 1965). Limitation of the definition of "subcontractor" to on-site performers is not appropriate under the Miller Act (id.; *MacEvoy, supra*) nor is "customized" work or material a satisfactory test by itself. Cerpac was working to specifications of the prime contract, was actively engaged in the course of the work and received progress payments under what the president of Rich himself understood and characterized as "the millwork subcontract" and "the plywood subcontract". His understanding should represent fairly the understanding of the building trades. Both the millwork and the plywood contracts specifically referred to the millwork and other items to be supplied in accordance with the Plans and Specfications, Section 4 of the government contract entitled "carpentry and millwork". Cerpac took over a substantial "part of the prime contract itself." Compare: *Traveler's Indemnity Co. v. U.S. ex rel. Western Steel Co.*, 362 F.2d 896 (9th Cir., 1966) Rich could have easily protected itself against loss by requiring Cerpac to give security for payment of those contracting with Cerpac. *MacEvoy, supra.*

The basic practical premise supporting the requirement that a Miller Act payment bond recovery be limited to those who, lacking a contractual relation with the prime contractor, deal with a "subcontractor", is that the sub-

contractors will be relatively few in number and well known to the prime contractor. *MacEvoy, supra*, at 322 U.S. 110. The prime contractor can then easily protect himself against claims concerning which he has no knowledge, by requiring bond security or other protection from these relatively few subcontractors.

Between 1963 and 1966, on a substantial number of government housing projects of Rich from Florida to Alaska valued in excess of fifty million dollars, Cerpac exclusively performed all the millwork manufacturing and plywood portions of the contracts between Rich and the federal government. In all Rich government contracts Cerpac was one of the well known few, and probably better known than most. Cerpac was indirectly financed by, and, for a time, controlled by principals of Rich. In no sense was Cerpac, or Cervi, an "ordinary laborer or materialman" so far as Rich was concerned. Having taken from Rich and performed specific and substantial parts of the original contract for Beale Air Force Base, Cerpac was a subcontractor for purposes of the Miller Act in this instance.

If Required, Notice Was Timely

For purposes of starting the 90 day period in which notice must be given under the Miller Act, 40 U.S.C. 270b, Rich and Transamerica would extract the last two deliveries by Industrial from the original order, "Beale 647", from Industrial's performance under that order by conceding a "direct contract" as to these final deliveries. The final shipments were delivered to Beale on May 16, 1966, and on June 23, 1966. Receipt of formal notice, July 15, 1966, is admitted and there is no contention the final de-

liveries were a sham for purposes of extending the notice period, only that an "entirely new relationship" is conceded to have been in existence at least as early as the next to last delivery on May 16, 1966. The final deliveries were integral components of the original contract, *U.S. ex rel. Austin v. Western Electric Co.*, 337 F.2d 568, 572 (9th Cir., 1964); *U.S. ex rel. General Electric Co. v. Gunnar I. Johnson, Inc.*, 310 F.2d 899 (8th Cir., 1962).

The contract was not completed until June 23, 1966, at which time the last delivery occurred, establishing the critical date from which to measure the notice period. *U.S. ex rel. Noland v. Andrews*, 406 F.2d 790 (4th Cir., 1969). As found by the District Court under the evidence, the implied contract was in existence between Rich and Industrial, but nothing limits that contract to the last two shipments or erases "Beale 647" as a whole. Industrial, in good faith, performed the original order, relying on the binding assurances of Rich, directly and through Cervi, that it would be paid for the material subject to the order. The exact type and amount of material required under the original order was delivered to Rich, at the same price Rich had always paid. Promptly after the order was finally filled, Industrial looked directly to Rich for payment and gave formal notice under the Miller Act when payment was not forthcoming.

The record demonstrates Industrial performed the one contract it had to deliver material and notified Rich within ninety (90) days of the last delivery; nothing more is required for recovery on the payment bond. *U.S. ex rel. Austin v. Western Electric Co., supra; U.S. ex rel. General Electric v. Hershson Co.*, 52 F. Supp. 832 (D.C. N.Y.,

1943) The assurances by Rich that Industrial would be paid resulted in a new relationship only in the sense that Rich voluntarily and for its necessary purposes incurred an obligation to pay Industrial for *all material* subject to the original order because Industrial would not otherwise deliver the balance of the order.

Unlike the situation in *U.S. ex rel. Munroe v. Praught*, 270 F.2d 235 (1st Cir., 1959) relied on by Petitioners, Industrial knew at the outset that the materials were to be used by Rich at Beale Air Force Base and looked to Rich for payment as early as May, 1966, when direct invoicing was approved and long before Cerpac filed bankruptcy in October, 1966. No different work or performance was expected or accomplished by Industrial; Rich was aware of and approved Industrial's precise involvement and performance. See, *T. F. Scholes, Inc. v. U.S. ex rel. Moore Equipment Co.*, 295 F.2d 366 (10th Cir., 1961)

Venue Was Proper

The Appellate Court in this case partially reversed the District Court so as to limit the award to Industrial against Transamerica to the amount due on "Beale 647", after deducting the stipulated price of the two shipments Rich diverted to its South Carolina project. As the payment bond surety for the project at Beale Air Force Base, Transamerica was held "liable only for the material supplied in connection with the bonded project." *U.S. ex rel. Carter-Schneider-Nelson, Inc. v. Campbell*, 293 F.2d 816, 818 (9th Cir., 1961), *cert. denied*, 386 U.S. 987. The Judgment on remand was so reduced with respect to Transamerica, therefore, only Rich can complain. As pointed out in the opinion of the Court of Appeals, the considerations affect-

ing the liability of Rich for the South Carolina shipments are quite different from those affecting the surety on a Miller Act payment bond.

The Miller Act requires that recovery on the payment *bond* be had by suit in the federal district "in which the contract was to be performed and executed." 40 U.S.C. 270b (b) This has frequently been construed as a venue provision. See: *U.S. ex rel. Capolino Sons, Inc. v. Electronic and Missile Facilities, Inc.*, 364 F.2d 705 (2nd Cir. 1966) *cert. dismissed*, 385 U.S. 924, and cases cited at p. 707.

No more is necessary to recovery against Rich for the South Carolina shipment than the contractual liability established in the record. The record shows Cervi's instructions concerning the partial diversion, although relayed to the mill through Industrial, did not alter the substantive validity of "Beale 647" in any material respect: parties, price, type, quantity and quality all remained the same so far as Rich is concerned. So did the site of performance of the original contract for purposes of the Miller Act; it would be manifestly unfair to defeat Industrial's claim because some of the material already ordered was diverted for the convenience of both Rich and Cerpac to use on another of their government projects. See: *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 F.2d 527, 529 (5th Cir., 1946)

Even if the two invoices for the shipment to Inness, South Carolina could properly be the basis for an action by Industrial against Rich in that federal district, the circuity of actions and expense which would result from imposing this limitation absolutely in this case would defeat the intent and purpose of Rule 42(a), Federal Rules of Civil

Procedure, and the liberal remedial purpose of the Miller Act. No evidence was introduced at trial in opposition to the substantive merit of this portion of Industrial's claim, and Rich stipulated the material was received in South Carolina and used on its government contract in Charleston. The District Court had jurisdiction of the case. *Siler v. Louisville & Nashville Railroad Co.*, 213 U.S. 175, 53 L.Ed. 753 (1909); Wright, *Federal Courts*, Sec. 19, p. 55 (1963). Rich has suffered no prejudice as a result of having this portion of the claim determined by the federal court for the Eastern District of California. Separate trials against the same prime contractor, and the additional time and expense for the litigants and the federal courts, should not be required.

Interest Was Properly Awarded After Revision on Appeal

All Industrial invoices under "Beale 647" provided for interest at the rate of 8% per annum from their respective due dates. The invoices each were due 30 days after their respective dates, at which time the interest commenced at the stated rate. The amount due and date of each invoice was finally stipulated by the parties at trial; the data is assembled and included in the trial court findings.

In an action by the supplier of a subcontractor under the Miller Act, liability for interest is governed by the subcontractor's obligation to the supplier. *L&E Co. v. U.S. ex rel. Kaiser Gypsum*, 351 F.2d 880, 883 (9th Cir., 1965) Under the Act there is no express provision for interest, so California law supplies the rule. *L&E Co., supra*, p. 883, citing *U.S. ex rel. Carter-Schneider-Nelso Inc. v. Campbell*, 293 F.2d 816 (9th Cir., 1961) By state statute, California Civil Code Sec. 3287, interest is recoverable from the due

date if the damages are "certain, or capable of being made certain, by calculation." In California, any legal rate of interest stipulated by contract is chargeable after a breach thereof. Calif. Civil Code Sec. 3289

While the District Court originally awarded statutory interest under California Civil Code Sec. 3287(b), as interest on an unliquidated claim, computed from the date the Complaint was filed, Industrial's claim was liquidated, and the District Court should have included in the Judgment the contract rate of interest of 8% per annum from the dates the respective Industrial invoices were due. The Appellate Court properly required this revision and it was incorporated in the Judgment on remand. See: *Atlantic Electric, Inc. v. Allis-Chalmers Manufacturing Co.*, 375 F.2d 726 (5th Cir., 1967); *Aetna Casualty and Security Co. v. U.S. ex rel. R. Studer & Sons*, 365 F.2d (8th Cir., 1966)

Attorneys' Fees Were Properly Awarded

The District Court in this case specifically found that: "A reasonable and necessary fee, were one to be awarded, is 25% of the plaintiff's recovery of principal and interest, which sum would be added to plaintiff's Judgment, if awarded." The District Court then ruled that such fees should not be awarded. The Court of Appeals reversed on this point and remanded the matter to the District Court for further consideration, holding that such fees "are definitely to be awarded" (473 F.2d at 278) and expressing no opinion about the amount or calculation of the fee, leaving this for the determination of the District Court. The District Court on remand then reaffirmed its original conclusion that a 25% attorney fee was reasonable and

necessary for services through trial, added a fee of $3,500.00 for services on appeal, and incorporated the award of attorneys' fees in the Judgment against Petitioners. Respondent respectfully submits the award of attorneys' fees was, in all respects, proper.

By its express statutory language, the Miller Act is not limited to payment of the invoice price of labor and materials furnished under a government construction contract. The Act is designed "for the *protection* of all persons supplying labor and material" in connection with a federal project. (emphasis supplied) 40 U.S.C. Sec. 270a(a) (2). The Act is, as it should be, construed liberally so that the Congressional intent and purpose to provide such "protection" may be effected. *Illinois Sur. Co. v. The John Davis Co.*, 244 U.S. 376, 380 (1917) (Brandeis, J.) When the protection of the Act is invoked, the claimant is, in the wording of the statute, entitled to "prosecute said action to final execution and judgment for the sum or sums justly due him . . ." 40 USC Sec. 270b(a).

The protection afforded by the Act expressly contemplates payment of "the sums justly due". Congress could have but did not detail explicitly each specific element to be included in a computation of "the sums justly due". For example, the Lanham Act (15 USC Sec. 1117) itemizes each of the components of the remedy afforded thereunder. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 720 (1967). But the fact Congress did not detail in the Miller Act the components of the remedy or the elements to be included in "the sums justly due," does not preclude the federal courts from doing so, in line with the express purpose of the Act, nor prevent the federal courts

from referring to state law to determine the appropriate elements of a Miller Act recovery in a particular state.

The state law referred to by the Ninth Circuit in this case was the California statute permitting the recovery of attorneys' fees in state court actions on the bonds of public work contractors (state and local government projects). Under California Government Code, Sec. 4207, the California legislature has provided as follows:

> "Upon the trial of the action, the Court shall award to the prevailing party a reasonable attorneys' fee to be taxed as costs, and to be included in the judgment therein rendered."

The California District Courts of Appeals, in *B. C. Richter Constr. Co. v. Continental Cas. Co.*, 230 Cal. App. 2d 491, 506, 41 Cal. Rptr. 98 (1964), had examined this provision and held that Government Code, Sec. 4207 had no application "to projects of the United States." 230 Cal. App. 2d, at 506. Petitioners urge that the California court has therefore decided what "the sums justly due" should be in an action brought in federal court under a federal statute enacted by Congress. This contention is erroneous. The same proposition was closely examined and rejected in *U.S. ex rel. Chevron Asphalt Co. v. Maryland Casualty Company*, 316 F. Supp. 750, 751 (E.D. Cal. 1970) (MacBride, C.J.); the legal discussion of Judge MacBride was expressly approved in the appellate decision of the instant case.

The analysis of Judge MacBride in *Chevron Asphalt, supra*, points out that attorneys' fees as part of the claim a Miller Act case must represent part of the federal statutory right created by Congress. The claim does not originate in either common law or the statute of any particular state. When making its determination of the sums justly due un-

der the federal law, the federal court should appropriately look to the purpose of the Miller Act. Because the Miller Act is the federal equivalent of state lien laws, the remedy in federal court is properly composed of the same elements as would be available to lien claimants in a state court collecting for labor and material furnished on non-federal projects. One of the elements permitted in the state court on government projects in California is attorneys' fees. Another of the statutory elements is the rate of interest allowed on a claim, dependent upon its status as a liquidated or an unliquidated amount due. These elements are derived from state legislation in California and express the state policy with respect to the remedy which should be available to an unpaid laborer or materialman. In this posture, there is no reason to differentiate between a claimant whose remedy is derived from a federal statute and a claimant whose remedy is derived from a state statute, when the federal remedy was intended to be the equivalent of the state remedy. *Illinois Sur. Co. v. John Davis Co., supra; Transamerica Insurance Company v. Red Top Metal, Inc.*, 384 F.2d 752 (5th Cir., 1967), and see, *U.S. ex rel. Walker & Co. v. Home Indemnity Co.*, 346 F. Supp. (D.C. Tex., 1972)

The decision by the Ninth Circuit in *U.S. ex rel. Getz Bros. & Co. v. Markowitz Bros. (Delaware) Inc.*, 383 F.2d 595 (9th Cir., 1967) does not conflict with the present decision by that court, nor stand for the proposition urged by Petitioners. The local law of Guam simply did not permit an award of attorneys' fees. Under the local statute relied on, a payment bond surety was not subject to the statutory liability of an insurer for attorneys' fees. *Markowitz, supra*, p. 598-599

The opinion of the District Court in *U.S. ex rel. Bartells Company v. Hoffman Construction Co.*, 163 F. Supp. 296 (E.D. Wash., 1958) is a clear expression of the view that a state statute allowing a reasonable attorneys' fee to the successful claimant in a lien foreclosure on a non-federal project is of no avail to a successful Miller Act claimant. The decision predates that of the Court of Appeals for that District in this case, and is contrary to the better view and weight of authority since developed on the point. See, e.g., *Transamerica Ins. Co. v. Red Top Metal, Inc., supra; U.S. ex rel. Pritchard Products Corp. v. Fullerton Constr. Co.*, 407 F.2d 1002 (4th Cir., 1969); *United States Fidelity & Guaranty Co. v. Hendry Corp.*, 391 F.2d 13 (5th Cir., 1968), *cert. denied* 383 U.S. 978, 21 L.Ed. 2d 439; *D&L Constr. Co. v. Triangle Electric Supply Co.*, 322 F.2d 1009 (8th Cir., 1964); *U.S. ex rel. Dixie Plumbing Supply Co. v. Taylor*, 293 F.2d 717 (5th Cir., 1961); *U.S. ex rel. Sanford v. Continental Casualty Co.*, 293 F.Supp. 816 (D.C. Miss. 1968).

As a federal remedial statute (an enactment made "in lieu of the lien . . . customary where property is owned by private persons," *Illinois Sur. Co., supra*, at 244 U.S. p. 380) the protection available under the Miller Act for federal projects should be equal to the customary protection afforded those who can invoke the state created remedy for non-federal projects. Had Congress detailed the elements of "the sums justly due" under the Miller Act to expressly include attorneys' fees, the result would unjustly favor federal claimants over state claimants where state law customarily does not permit attorneys' fees. The parity of the claimants in each state should be preserved by this Court.

CONCLUSION

Respondent respectfully submits that the decision of the United States Court of Appeals for the Ninth Circuit with respect to each issue raised by the Petitioners herein should be affirmed.

Respectfully submitted,

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F. D. RICH CO., INC., ET AL. *v.* UNITED STATES FOR THE USE OF INDUSTRIAL LUMBER CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–1382. Argued January 9, 1974—Decided May 28, 1974

Petitioner F. D. Rich Co., the prime contractor on a federal housing project in California, had two separate contracts for the project with Cerpac Co., one contract being for Cerpac to select, modify, detail, and install all custom millwork and the other being for Cerpac to supply all exterior plywood. Cerpac in turn ordered the lumber called for under the plywood contract from respondent. When Rich needed plywood for another project in South Carolina, one of the shipments called for by respondent's contract with Cerpac was diverted to South Carolina. When Cerpac defaulted on its payments to respondent for the plywood, including the South Carolina shipment, respondent gave notice to Rich and its surety of a Miller Act claim and thereafter brought suit in the Federal District Court for the Eastern District of California where the California project was located. Finding that Cerpac was a "subcontractor" within the meaning of the Miller Act, rather than merely a materialman, that hence respondent could assert a Miller Act claim against Rich, and that venue for suit on the South Carolina as well as the California shipments properly lay, under 40 U. S. C. § 270b (b), in the Eastern District of California, the District Court granted judgment for respondent for the amount due on the unpaid invoices, but denied its claim for attorneys' fees. The Court of Appeals affirmed in large part, but held that attorneys' fees should be awarded respondent. *Held:*

1. Based on the substantiality and importance of its relationship with the prime contractor, *MacEvoy Co.* v. *United States ex rel. Tomkins Co.*, 322 U. S. 102, Cerpac was clearly a subcontractor for Miller Act purposes, considering not just its plywood contract but also its custom millwork contract on the California project. Moreover, Cerpac and Rich had closely interrelated management and financial structures, and their relationship on the California

project was the same as on many other similar projects; hence it would have been easy for Rich to secure itself from loss as a result of Cerpac's default. Pp. 121–124.

2. Venue for suit on the South Carolina shipment properly lay in the Eastern District of California, since there was clearly a sufficient nexus for satisfaction of § 270b (b)'s venue requirements. The contract between Cerpac and respondent was executed in California, all materials thereunder to be delivered to the California worksite. California remained the site for performance of the original contract despite the diversion of one shipment to South Carolina. There was no showing of prejudice resulting from the case's being heard in California and considerations of judicial economy and convenience supported venue in the court where all of respondent's claims could be adjudicated in a single proceeding. Pp. 124–126.

3. Attorneys' fees were improperly awarded respondent. Pp. 126–131.

(a) The Court of Appeals erred in construing the Miller Act to require the award by reference to the "public policy" of the State in which suit was brought, since the Act provides a federal cause of action and there is no evidence of any congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees. Pp. 127–128.

(b) The provision of the Miller Act in 40 U. S. C. § 270b (a) that claimants should recover the "sums justly due," does not require the award of attorneys' fees on the asserted ground that without such fee shifting, claimants would not be fully compensated. To hold otherwise would amount to judicial obviation of the "American Rule" that attorneys' fees are not ordinarily recoverable in federal litigation in the absence of a statute or contract providing therefor, in the context of everyday commercial litigation, where the policies which underlie the limited judicially created departures from the rule are inapplicable. Pp. 128–131.

473 F. 2d 720, affirmed in part and reversed in part.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 131.

Lawrence Gochberg argued the cause for petitioners. With him on the brief were *Otto Rohwer* and *Ronald N. Paul.*

Dennis S. Harlowe argued the cause for respondent. With him on the brief was *E. M. Murray.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Miller Act, 49 Stat. 793, as amended, 80 Stat. 1139, 40 U. S. C. § 270a *et seq.*, requires a Government contractor [1] to post a surety bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for" in the contract. The Act further provides that any person who has so furnished labor or material and who has not been paid in full within 90 days after the last labor was performed or material supplied may bring suit on the payment bond for the unpaid balance. 40 U. S. C. § 270b (a). This case presents several unresolved issues of importance in the administration of the Act.

I

Between 1961 and 1968, petitioner F. D. Rich Co. was the prime contractor on numerous federal housing projects. During the years 1963–1966, much if not all of the plywood and millwork for these projects was supplied by Cerpac Co. The Cerpac organization was closely intertwined with Rich. The principals of Rich held a substantial voting interest in Cerpac stock, supplied a major share of its working capital, and were thoroughly familiar with its operations and financial condition.

On October 18, 1965, Rich contracted with the United States to build 337 family housing units at Beale Air

[1] Government contracts of less than $2,000 in value are excepted from the statute's coverage.

Force Base, California. Rich's Miller Act surety, petitioner Transamerica Insurance Co., posted the payment bond required by the Act. Rich then awarded Cerpac two contracts on the project, one to select, modify, detail, and install all custom millwork, and one merely to supply all standard exterior plywood, each contract incorporating by reference terms of the prime contract. A similar arrangement was employed by Rich and Cerpac on other projects during this period.

On February 22, 1966, Cerpac placed a single order with respondent Industrial Lumber Co. for all exterior plywood required under its plywood contract for the Beale project. Industrial is a broker, purchasing wood products and materials for resale. It acknowledged the complete Cerpac order, purchased the plywood from its own suppliers and arranged for deliveries at the Beale site to begin on March 10, 1966. Each shipment was receipted as it arrived on the site by a Rich representative.

Shortly after Industrial's shipments began, Rich informed Cerpac that more plywood was needed for another Government project being constructed in Charleston, South Carolina, for which Cerpac had also contracted to supply Rich with all exterior plywood. Rich and Cerpac decided to divert some of the Beale lumber to Charleston. Accordingly, Industrial was advised to supply a shipment of the plywood called for under its Beale contract with Cerpac to the South Carolina site. Industrial arranged for the wood to be shipped by one of its suppliers to a railhead near Charleston. The shipment diverted to South Carolina was one of 22 called for by Industrial's Beale Contract.[2] There were several subsequent shipments to the California site under that contract.

[2] Shipments under the contract were invoiced by the truckload. The South Carolina shipment involved two such truckloads, while the other 21 shipments were each of only one truckload of lumber.

During April and May 1966, Cerpac fell behind in its payments to Industrial, and on July 13, 1966, having not received payment on invoices for nine separate shipments, Industrial gave notice to Rich and its surety of a Miller Act claim and thereafter brought the instant action in the Federal District Court for the Eastern District of California.[3] The District Court recognized that under our decision in *MacEvoy Co.* v. *United States ex rel. Tomkins Co.*, 322 U. S. 102 (1944), Rich's liability turned on whether Cerpac was a "subcontractor" within the meaning of the Act or merely a materialman. The District Court found that Cerpac was a subcontractor; hence Industrial, as its supplier, could assert a Miller Act claim against Rich, the prime contractor on the project. The District Court also rejected Rich's claim that venue for suit on the South Carolina shipment was improper in the Eastern District of California. Accordingly, the District Court granted judgment for Industrial, holding Cerpac [4] and Rich as primary obligees and Transamerica on its bond, jointly and severally liable for the amount of all nine unpaid invoices, $31,402.97, including the amount

[3] When Cerpac fell behind in its payments, Industrial indicated it would not deliver the final two truckloads of wood to the Beale project until it received satisfactory assurances of payment. Rich agreed to pay Industrial directly for the last two shipments, with Cerpac to receive its customary profit as a commission from Industrial. The last two shipments were made on May 18 and June 23, 1966, invoices being payable in full 30 days thereafter. The shipments were invoiced directly to Rich with copies to Cerpac, the invoices showing the shipments as being under the original "Beale 647" contract between Industrial and Cerpac. Rich nonetheless refused to pay the full invoice price of the two final shipments. Rich has since conceded its obligation to pay Industrial's claim for these two shipments, so there is no longer any controversy in regard to the amounts due on those invoices.

[4] Cerpac subsequently filed for discharge in bankruptcy and is no longer a party.

due on the shipment diverted to South Carolina. The District Court, however, denied Industrial's claim for attorneys' fees.

Both Rich and Industrial appealed. The Court of Appeals affirmed the judgment against Rich in large part.[5] On Industrial's cross-appeal, the court reversed, holding that attorneys' fees should have been awarded to Industrial as a successful plaintiff under the Miller Act, and remanded to the District Court for consideration of the amount of attorneys' fees to be awarded. 473 F. 2d 720 (CA9 1973). We granted certiorari.[6] 414 U. S. 816 (1973). We affirm the judgment below to the extent it holds that Cerpac was a "subcontractor" for Miller Act purposes and that there was proper venue, but reverse as to the propriety of an award of attorneys' fees.

II

Section 270a (a)(2) of the Miller Act establishes the general requirement of a payment bond to protect those who supply labor or materials to a contractor on a federal

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[5] All invoices under the Beale contract between Industrial and Cerpac were payable within 30 days with interest at an annual rate of eight percent after the due date. The District Court awarded Industrial seven percent interest on all "unliquidated claims." The Court of Appeals, however, ruled that the amounts due under the terms of the contract were liquidated damages and should bear an interest rate of eight percent.

The District Court had also given judgment against Transamerica on its bond for the shipment which was sent to the South Carolina site. The Court of Appeals held that judgment should not have been rendered against Transamerica for material not delivered to the project for which it served as surety.

[6] Petitioners also raise issues in their brief concerning the timeliness of the Miller Act notice and the amount of prejudgment interest awarded respondent. Those issues were not raised in the petition for certiorari, hence are not properly before the Court. See, *e. g.*, *Namet* v. *United States*, 373 U. S. 179, 190 (1963); Rule 23.1 (c) of the Rules of this Court.

project. Ordinarily, a supplier of labor or materials on a private construction project can secure a mechanic's lien against the improved property under state law. But a lien cannot attach to Government property, see *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380 (1917), so suppliers on Government projects are deprived of their usual security interest. The Miller Act was intended to provide an alternative remedy to protect the rights of these suppliers.

The rights afforded by the Act are limited, however, by the proviso of § 270b (a). In *MacEvoy Co.* v. *United States ex rel. Tomkins Co.*, 322 U. S. 102 (1944), this Court construed § 270b (a) to limit the protection of a Miller Act bond to those who had a contractual agreement with the prime contractor or with a "subcontractor." Those in more remote relationships, including persons supplying labor or material to a mere materialman, were found not to be protected. *Id.*, at 109–111. Industrial was a supplier of materials to Cerpac. Thus, if Cerpac were a subcontractor for purposes of the Act, Industrial, having given the required statutory notice, could assert a Miller Act claim against Rich, the prime contractor. But, if Cerpac were merely a materialman, Industrial could not assert its Miller Act claim since it would be merely a supplier of materials to a materialman, a relationship found too remote in *MacEvoy* to enjoy the protections of the Act.

Petitioners assert that the courts below erred in finding Cerpac a subcontractor. Cerpac's role under the plywood contract alone was that of a broker receiving standard lumber supplied by Industrial and, in turn, supplying it without modification to Rich. Petitioners argue that the court should not have looked beyond the plywood contract to determine Cerpac's status under the Act.

In *MacEvoy, supra,* the Court adopted a functional rather than a technical definition for the term subcontractor, as used in the proviso. The Court noted that a subcontractor is "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract . . . ." 322 U. S., at 109. The Court went on to explain the reason for the exclusion from the protections of the Act of suppliers of mere materialmen as opposed to those who supply subcontractors:

> "The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. *It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors.* . . . But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer." *Id.,* at 110. (Emphasis added.)

The Court of Appeals properly construed our holding in *MacEvoy* to establish as a test for whether one is a subcontractor, the substantiality and importance of his relationship with the prime contractor.[7] It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few "subcontractors" with whom he has a

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[7] See, *e. g., Aetna Casualty & Surety Co.* v. *United States ex rel. Gibson Steel Co.,* 382 F. 2d 615, 617 (CA5 1967); *Basich Bros. Construction Co.* v. *United States ex rel. Turner,* 159 F. 2d 182 (CA9 1946); cf. *United States ex rel. Bryant* v. *Lembke Construction Co.,* 370 F. 2d 293 (CA10 1966).

substantial relationship in the performance of the contract.

Measured against that test, Cerpac was clearly a subcontractor for the purposes of the Act. The Miller Act is "highly remedial [and] entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects." *MacEvoy, supra,* at 107. It is consistent with that intent to look at the total relationship between Cerpac and Rich, not just the contract to supply exterior plywood, to determine whether Cerpac was a subcontractor.[8] Cerpac had not only agreed to supply standard plywood but also had a separate contract to select, modify, detail and install all custom millwork for the Beale project. Cerpac, in effect, took over a substantial part of the prime contract itself. Moreover, the management and financial structures of the two companies were closely interrelated and their relationship on the Beale project was the same as on many other similar Government projects during the same period. Cerpac was, as the Court of Appeals observed, "in a special, integral, almost symbiotic relationship [with] Rich." 473 F. 2d, at 724. It would have been easy for Rich to secure itself from loss as a result of a default by Cerpac.

III

We also agree with the courts below that venue under the Miller Act for suit on the shipment diverted to South Carolina properly lay in the Eastern District of California. The Act provides that:

> "Every suit instituted under this section shall be brought in . . . the United States District Court for

[8] *Travelers Indemnity Co.* v. *United States ex rel. Western Steel Co.*, 362 F. 2d 896, 898 (CA9 1966); *United States ex rel. Wellman Engineering Co.* v. *MSI Corp.*, 350 F. 2d 285, 286 (CA2 1965).

> any district in which the contract was to be performed and executed and not elsewhere . . . ." 40 U. S. C. § 270b (b).

Petitioners argue that this provision bars a district court in California [9] from adjudicating respondent's claims arising from the shipments of plywood delivered in South Carolina. But § 270b (b) is merely a venue requirement [10] and there was clearly a sufficient nexus for its satisfaction. The "Beale 647" contract between Cerpac and Industrial was executed in California, all of the materials described therein to be delivered to a worksite in that State. Although one of the 22 shipments made pursuant to the contract was later diverted to South Carolina for petitioner Rich's convenience, the site for performance of the original contract remained the same for Miller Act purposes.[11] Several shipments to the Beale site were made after the South Carolina shipment. Moreover, petitioners have pointed to no prejudice resulting from the case's being heard in the California court and considerations of judicial economy and convenience clearly support venue in the

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[9] Beale Air Force Base is located in the jurisdiction of the Federal District Court for the Eastern District of California, hence respondent brought suit on the Beale contract in that court.

[10] *United States ex rel. Capolino Sons, Inc.* v. *Electronic & Missile Facilities, Inc.*, 364 F. 2d 705 (CA2 1966); see cases collected, *id.*, at 707.

[11] The Court of Appeals reversed the judgment against Transamerica, on its bond, as to the shipment of wood diverted to South Carolina, because a Miller Act surety is liable only for material supplied for use on the bonded project. But, a decision on the ultimate question of the surety's liability involves different considerations from the questions of whether venue for suit on the bond is proper. Petitioner Rich's liability for the amount due on the South Carolina shipment was based on a pendent claim, the substance of which was not challenged in this Court or in the Court of Appeals.

District Court where all of respondent's claims arising from the "Beale 647" contract could be adjudicated in a single proceeding.

IV

We turn now to the question of whether attorneys' fees were properly awarded respondent as a successful Miller Act plaintiff. The so-called "American Rule" governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717 (1967). There was no contractual provision concerning attorneys' fees in this case. Nor does the Miller Act explicitly provide for an award of attorneys' fees to a successful plaintiff. But the Court of Appeals construed the Act to require an award of attorneys' fees where the "public policy" of the State in which suit was brought allows for the award of fees in similar contexts. The court reasoned that the Act provides remedies " 'in lieu of the lien upon land and buildings customary where property is owned by private persons' . . . . The federal remedy was intended to substitute for the unavailable state remedy of the lien. Therefore, if state [law] allows a supplier on private projects to recover such fees, there is no reason for a different rule to apply to federal projects . . . ." [12] Looking to California law, the Court of Appeals found an award of attorneys' fees proper because Calif. Govt. Code § 4207 (1966) allowed for the recovery of at-

[12] 473 F. 2d 720, 727 (1973). The same analysis has been accepted in several circuits; see *Transamerica Insurance Co.* v. *Red Top Metal, Inc.*, 384 F. 2d 752 (CA 5 1967); *United States ex rel. White Masonry, Inc.* v. *F. D. Rich Co.*, 434 F. 2d 855, 859 (CA9 1970); *Arnold* v. *United States ex rel. Bowman Mechanical Contractors, Inc.*, 470 F. 2d 243, 245 (CA10 1972).

torneys' fees in state actions on the bonds of contractors for state and municipal public works projects.[13]

We think the Court of Appeals erred in its construction of the statute. The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby are matters of federal not state law. Neither respondent nor the court below offers any evidence of congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees. Many federal contracts involve construction in more than one State, and often, as here, the parties to Miller Act litigation have little or no contact, other than the contract itself, with the State in which the federal project is located. The reasonable expectations of such potential litigants are better served by a rule of uniform national application.

A uniform rule also avoids many of the pitfalls which have already manifested themselves in using state law referents. For example, California law does not provide for awards of attorneys' fees in suits arising from private construction projects. And, a California court had held that the state statute providing for awards of attorneys' fees in suits on the bonds of state and municipal public works contractors is inapplicable to construction projects of the United States.[14] The Court of Appeals nonethe-

[13] After the decision in the District Court, but prior to the Court of Appeals' opinion, Calif. Govt. Code § 4207 (1966) was replaced, and the effective provisions transferred to Calif. Civ. Code § 3250 (Supp. 1974), by an act of the California Legislature, dated August 31, 1969, that took effect on January 1, 1971. Given our reasoning, however, the revision in language of the applicable California law is of no relevance to the result reached herein.

[14] *B. C. Richter Contracting Co.* v. *Continental Casualty Co.*, 230 Cal. App. 2d 491, 41 Cal. Rptr. 98 (1964) (construing the former law, see n. 13, *supra*).

less held that since federal law controls Miller Act recoveries, it was free to look to "state policy" rather than state law and proceeded to find an award of attorneys' fees appropriate. Although the court below premised its decision on the theory that a Miller Act remedy is afforded " 'in lieu of the lien upon land and buildings customary where property is owned by private persons,' " it gave respondent more protection than California law affords litigants involved in disputes arising from private construction projects who are not entitled to an award of attorneys' fees. We think it better to extricate the federal courts from the morass of trying to divine a "state policy" as to the award of attorneys' fees in suits on construction bonds.

Finally, the Court of Appeals intimates that in providing that Miller Act claimants should recover the "sums justly due," 40 U. S. C. § 270b (a), Congress must have intended to provide for the award of attorneys' fees because without such fee shifting, Miller Act claimants would not be fully compensated—the claimant's recovery would always be diminished by the cost of his legal representation. This argument merely restates one of the oft-repeated criticisms of the American Rule.[15] Almost a half century ago, the Massachusetts Judicial Council pleaded for reform, asking, "On what principle of justice can a plaintiff wrongfully run down on a public highway recover

[15] The American Rule has come under repeated criticism over the years. See generally Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); McLaughlin, The Recovery of Attorney's Fees: A New Method of Financing Legal Services, 40 Ford. L. Rev. 761 (1972); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967).

his doctor's bill but not his lawyer's bill?" [16] We recognize that there is some force to the argument that a party who must bear the costs of his attorneys' fees out of his recovery is not made whole. But there are countervailing considerations as well. We have observed that "one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967). Moreover, "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees," *ibid.*, has given us pause, even though courts have regularly engaged in that endeavor in the many contexts where fee shifting is mandated by statute, policy, or contract. Finally, there is the possibility of a threat being posed to the principle of independent advocacy by having the earnings of the attorney flow from the pen of the judge before whom he argues.

The American Rule has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons,[17] or where a successful litigant

[16] Judicial Council of Massachusetts, First Report, 11 Mass. L. Q. 1, 64 (1925).

[17] See, *e. g.*, *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962); *McEnteggart* v. *Cataldo*, 451 F. 2d 1109 (CA1 1971); *Bell* v. *School Bd. of Powhatan County*, 321 F. 2d 494 (CA4 1963); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473 (CA4 1951); 6 J. Moore, Federal Practice ¶ 54.77 [2], p. 1709 (2d ed. 1974).

has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class.[18] The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies.[19] This "private attorney general" rationale has not been squarely before this Court and it is not so now; nor do we intend to imply any view either on the validity or scope of that doctrine. It is sufficient for our purposes here to observe that this case clearly does not fall within any of these exceptions.

Miller Act suits are plain and simple commercial litigation. In effect then, we are being asked to go the last mile in this case, to judicially obviate the American Rule in the context of everyday commercial litigation, where

[18] See, *e. g.*, *Hall* v. *Cole*, 412 U. S. 1 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Natural Resources Defense Council* v. *EPA*, 484 F. 2d 1331 (CA1 1973); *Callahan* v. *Wallace*, 466 F. 2d 59 (CA5 1972); *Bright* v. *Philadelphia-Baltimore-Washington Stock Exchange*, 327 F. Supp. 495, 506 (ED Pa. 1971); cf. Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N. Y. U. L. Rev. 301 (1973); Comment, The Allocation of Attorney's Fees After *Mills* v. *Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971).

[19] See, *e. g.*, *Cooper* v. *Allen*, 467 F. 2d 836 (CA5 1972); *Knight* v. *Auciello*, 453 F. 2d 852 (CA1 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971); *La Raza Unida* v. *Volpe*, 57 F. R. D. 94 (ND Cal. 1972); *Ross* v. *Goshi*, 351 F. Supp. 949 (Haw. 1972); *Sims* v. *Amos*, 340 F. Supp. 691 (MD Ala. 1972); cf. *Bradley* v. *School Bd. of the City of Richmond*, 416 U. S. 696 (1974); *Northcross* v. *Memphis City Bd. of Education*, 397 U. S. 232 (1970); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968); Nussbaum, n. 18, *supra*; Note, Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L. J. 733 (1973).

the policies which underlie the limited judicially created departures from the rule are inapplicable. This we are unprepared to do. The perspectives of the profession, the consumers of legal services, and other interested groups should be weighed in any decision to substantially undercut the application of the American Rule in such litigation. Congress is aware of the issue.[20] Thus whatever the merit of arguments for a further departure from the American Rule in Miller Act commercial litigation, those arguments are properly addressed to Congress.

The judgment of the Court of Appeals is affirmed insofar as it holds that Cerpac is a subcontractor for Miller Act purposes and that there was proper venue for suit on the shipment diverted to South Carolina, but reversed insofar as it holds that an award of attorneys' fees to respondent Industrial is required by the Act.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting in part.

The Court, dealing with the Miller Act's predecessor, held in *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380, that the Heard Act "must be construed liberally." That same principle applies to the Miller Act. *Fleisher Co.* v. *United States ex rel. Hallenbeck*, 311 U. S. 15, 17–18. The Act is silent as to attorneys' fees, saying only that the payment bond shall allow the supplier "to prosecute said action to final execution and judgment for the sum or sums justly due him." 40 U. S. C. § 270b (a).

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[20] A congressional committee charged with making a broad-based inquiry about legal services is currently studying, *inter alia*, the general issue of attorneys' fees. Hearings on Legal Fees before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess. (1973); cf. S. Rep. No. 93–146 (1973), accompanying S. Res. 101.

The Miller Act is unlike the Lanham Act involved in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714. That Act itemized the components of the remedy which the Act afforded: injunctive relief, treble damages, and "costs" (which by federal statute did not include attorneys' fees). *Id.*, at 719–720. Moreover, attempts to amend the Lanham Act to include attorneys' fees had never succeeded, *id.*, at 721. Here there is no such legislative history; nor does the Miller Act itemize the components of the "sum or sums justly due."

The Court says that dependence on state law is inappropriate, for we deal with a federal standard that should be uniform. That takes great liberties with the Miller Act. Here the contract and law were made in California and were to be performed there. In *Illinois Surety Co.* v. *John Davis Co.*, *supra*, the contract and law were made in Illinois and were to be performed there. "Questions of liability for interest must therefore be determined by the law of that State," said Mr. Justice Brandeis speaking for the Court, 244 U. S., at 381. If state law would give the claimant interest, it should give him attorneys' fees based on the purpose of the Miller Act. Judge Carter writing for the Court of Appeals pointed out that the Miller Act is the federal equivalent of state lien laws. See 473 F. 2d 720, 727. The remedy in a federal suit is therefore properly composed of the same elements as would be available to lien claimants in a state court collecting for labor and materials furnished on nonfederal projects. One of the elements of recovery permitted in a California court is attorneys' fees. The "sum or sums justly due" should as a matter of federal law be construed to be the same as that due a claimant whose remedy is based on a state statute, when the federal remedy was intended to be the equivalent of the state remedy.

What Mr. Justice Brandeis said of interest is equally applicable to attorneys' fees under the Miller Act.* Under the circumstances present here it would seem quite unjust not to include in the sum that is due the cost of collecting that sum.

*The Court of Appeals for the Fifth Circuit awarded attorneys' fees under a Florida statute where suit was brought under the Miller Act, *United States ex rel. Weyerhaeuser Co.* v. *Bucon Construction Co.*, 430 F. 2d 420, 425. And see *United States ex rel. White Masonry, Inc.* v. *F. D. Rich Co.*, 434 F. 2d 855, 859, where the Court of Appeals for the Ninth Circuit followed Alaska law.